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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.

RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Shawn Eubanks,

Petitioner,

vs.

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

Respondent.

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

**ORDER GRANTING
RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT**

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

FILED
November 5, 2020

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), SCRPC, 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.

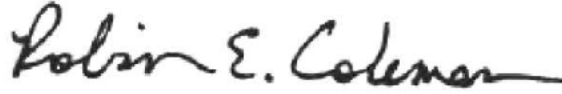
A handwritten signature in black ink that reads "Deborah Brooks Durden". The signature is written in a cursive, flowing style.

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

November 5, 2020
Columbia, South Carolina

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November 5, 2020

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Shawn Eubanks,

Petitioner,

vs.

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

Respondent.

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

**ORDER DENYING
PETITIONER'S MOTION
FOR RECONSIDERATION**

This matter is before the Administrative Law Court (ALC or Court) pursuant to the Petitioner's Notice of Motion and Motion for Reconsideration, seeking reconsideration of the Court's Order issued on November 5, 2020. The motion merely reiterates the arguments made in the parties' Motions for Summary Judgment, which were carefully considered and ruled upon by this Court. This motion does not seek to correct manifest errors of law or fact or to present newly discovered evidence. Therefore,

IT IS HEREBY ORDERED that Petitioner's Motion for Reconsideration is **DENIED**.
AND IT IS SO ORDERED.



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

November 24, 2020
Columbia, South Carolina

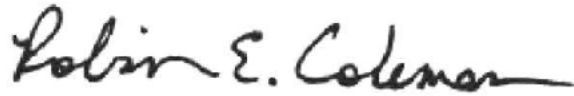
FILED

November 24, 2020

SC ADMIN. LAW COURT

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

November 24, 2020
Columbia, South Carolina

FILED

November 24, 2020

SC ADMIN. LAW COURT

**South Carolina Administrative Law Court (SC ALC)
Request for Contested Case Hearing FORM**

Last Name: EUBANKS		First: SHAWN	Middle: D.	<input checked="" type="checkbox"/> Mr. <input type="checkbox"/> Miss <input type="checkbox"/> Mrs. <input type="checkbox"/> Ms.	Docket No. (To Be Completed by ALC)
Mailing Address: [REDACTED]		City: COLUMBIA	State and Zip: SC 29201		
Home Number: [REDACTED]	Work Number: [REDACTED]	Cell Number: [REDACTED]	*E-Mail Address: [REDACTED]		

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

REPRESENTATION

Are you representing yourself? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	If No, please complete the following:
Are you represented by an Attorney? <input type="checkbox"/> Yes <input type="checkbox"/> No	Are you represented by a CPA? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Name of Attorney:	Name of CPA:
Mailing Address:	Mailing Address:
City, State and Zip:	City, State and Zip:
Work Number, Cell Number and E-mail Address:	Work Number, Cell Number and E-mail Address:

CASE INFORMATION

Name of the Agency that issued the decision: **PEBA**
(Example - Dept. of Revenue, Dept. of Insurance, DHEC)

In order to have your case processed, **you must attach the agency decision.** Is it attached?:
 Yes No

If no, please explain:

Date the decision was issued: **MAY 4, 2020** Date the decision was received: **MAY 6, 2020**

Please provide a brief statement regarding why the hearing is being requested and the relief sought:

I WAS IMPROPERLY DENIED ENROLLMENT IN THE SOUTH CAROLINA RETIREMENT SYSTEM, AS THE PEBA HAS MISAPPLIED AND MISINTERPRETED THE RELEVANT STATUTE. I REQUEST REVERSAL OF PEBA'S DECISION, WHICH THEREFORE WOULD ALLOW ME TO ENROLL IN SCRS, AS WELL AS CREDIT FOR THE TIME LOST DUE TO THIS DENIAL.

Payment via Check Money Order Cash for \$ submitted today to the Administrative Law Court via _____
(applicable filing fee pursuant to ALC Rule 71) is being U.S. Postal Service Hand-delivery

[Signature] _____ 5/14/2020
Date

X Your Signature or Signature of Attorney/CPA

CERTIFICATE OF SERVICE (MUST BE COMPLETED)

Your Name:	Date:	City:	State:
I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing on all other parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):			
Justin Werner, Esq.	PEBA 202 Arbor Lake Dr	Columbia SC 29223	
Name and/or Agency	Address	City, State and Zip	
Name and/or Agency	Address	City, State and Zip	
<i>[Signature]</i>		<u>5/14/2020</u>	
X Your Signature or Signature of Attorney/CPA		Date	



FINAL AGENCY DETERMINATION

NO. 20-009

In Re: Shawn Eubanks, SSN XXX-XX-7451

This Final Agency Determination is issued in accordance with the South Carolina Retirement Systems Claims Procedures Act set out at S.C. Code Ann. §§ 9-21-10 *et seq.* (2019) and the South Carolina Retirement Systems Claims Procedure (2005). In this matter, Shawn Eubanks (“Claimant”) requests that the South Carolina Public Employee Benefit Authority (“PEBA”) reconsider its determination that he is not eligible to end his participation in the State Optional Retirement Program and elect membership in the South Carolina Retirement System.

BACKGROUND

Claimant Shawn Eubanks is a participant in the State Optional Retirement Program (“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 South Carolina Retirement System (“SCRS”) defined benefit pension plan. As set forth in detail below, Claimant 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, Claimant 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 State ORP, Claimant designated TIAA-CREF as the vendor for his ORP account. Notably, the information provided on the form immediately above Claimant’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, Claimant 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, Claimant returned to covered employment under the State ORP upon being hired by the South Carolina Department of

Education on July 2, 2012. By a Retirement Plan Enrollment executed that same day, Claimant reenrolled in the State ORP in connection with his employment with the Department of Education, selecting The Hartford as the vendor for his ORP account. The enrollment form signed by Claimant contained the same notice provided on his 2009 enrollment form regarding the irrevocability of his election to participate in the State ORP. As a result of that reenrollment, Claimant continued his participation in the State ORP in connection with his employment with the Department of Education from 2012 to 2015.

Most recently, Claimant 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. By an electronic Retirement Plan Enrollment form submitted on June 12, 2019, Claimant elected to continue his participation in the State ORP in his employment with the Treasurer's Office, selecting MetLife as the vendor for his account. Approximately six months later, by an email to PEBA on December 16, 2019, Claimant inquired about his eligibility to end his participation in the State ORP and enroll in SCRS during the upcoming 2020 open enrollment period. By a response email that same day, a PEBA customer service representative explained that Claimant 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.

By a Retirement Plan Enrollment form executed January 8, 2020, Claimant formalized his request to end his ORP participation and enroll in SCRS, and, by a letter dated February 7, 2020, PEBA's Enrollment Department notified Claimant that his enrollment 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. By a letter received February 24, 2020, Claimant sought further review of the determination that he is not eligible to end his participation in the State ORP and enroll in SCRS. This Final Agency Determination is issued in response to that request for review.

DISCUSSION

In this matter, Claimant 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, Claimant 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 number of months

he has actively contributed to a State ORP account over that time has not yet reached five years. However, as set forth below, I find that Claimant’s request to end his State ORP participation and enroll in SCRS was properly denied by PEBA.

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 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.” 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 or some other measure of duration of participation. Id.

In the instant matter, Claimant’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, Claimant’s eligibility to end his

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).

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. And, although Claimant 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. § 9-20-40(B). Accordingly, once Claimant 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 Claimant 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 applicable statutes. Further, given the nature of the statutory requirements at issue in this matter, PEBA does not have the legal authority to ignore the plain language of the ORP statutes and to allow Claimant to end his ORP participation and 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)); see also, e.g., Meleqkasim Shehu v. S.C. Pub. Employee Benefit Auth., Docket No. 19-ALJ-30-0206-CC (S.C. Admin. Law Ct. Sept. 9, 2019); Louis F. Dessau v. S.C. Pub. Employee Benefit Auth., Docket No. 19-ALJ-30-0178-CC (S.C. Admin. Law Ct. Dec. 2, 2019). In sum, because Claimant is no longer eligible to end his State ORP participation and join SCRS under Section 9-20-40(B), his election to participate in the State ORP is irrevocable and cannot now be rescinded in favor of an election to enroll in SCRS so long as he remains in his current employment.

CONCLUSION

For the foregoing reasons, I find that that Claimant's request to end his participation in the State ORP and enroll in SCRS was properly denied by PEBA.



Peggy G. Boykin, CPA
Executive Director

May 4, 2020
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Shawn Eubanks,)	
)	
Petitioner,	)	RESPONDENT’S NOTICE OF MOTION
	)	AND MOTION FOR SUMMARY
v.	)	JUDGMENT
)	
South Carolina Public Employee Benefit	)	DOCKET NO. 20-ALJ-30-0117-CC
Authority, South Carolina Retirement)	
Systems,)	
)	
Respondent.)	
_____)	

TO: SHAWN EUBANKS, PETITIONER

PLEASE TAKE NOTICE that Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems (“PEBA”), by and through its undersigned counsel, hereby moves before the Honorable Deborah Brooks Durden for an order granting summary judgment in the above-captioned matter in favor of Respondent pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and Rules 19(A) and 68 of the Rules of Procedure for the Administrative Law Court. Respondent makes this motion on the grounds that there is no genuine issue as to any material fact in this case and that Respondent is entitled to a judgment in its favor as a matter of law under S.C. Code Ann. § 9-20-40 (2019).

BACKGROUND

Petitioner Shawn Eubanks is a participant in the State Optional Retirement Program (“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 South Carolina Retirement System (“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 executed 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. (Ex. #1.) In electing to participate in the State ORP, Petitioner designated TIAA-CREF as the vendor for his ORP account.

Notably, 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.

(Ex. #1.) As a result of the submission of the enrollment form, Petitioner 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, Petitioner returned to covered employment under the State ORP upon being hired by the South Carolina Department of Education on July 2, 2012. (Ex. #2.) By a Retirement Plan Enrollment executed that same day, Petitioner reenrolled in the State ORP in connection with his employment with the Department of Education, selecting The Hartford as the vendor for his ORP account. (Ex. #2.) 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. (Ex. #2.) As a result of that reenrollment, Petitioner continued his participation in the State ORP in connection with his employment with the Department of Education from 2012 to 2015.

Most recently, Petitioner 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. (Ex. #3.) By an electronic Retirement Plan Enrollment form submitted on June 12, 2019, Petitioner elected to continue his participation in the State ORP in his employment with the Treasurer's Office, selecting MetLife as the vendor for his account. (Ex. #3.) Approximately six months later, by an email to PEBA on December 16, 2019, Petitioner inquired about his eligibility to end his participation in the State ORP and enroll in SCRS during the upcoming 2020 open enrollment period. (Ex. #4.) By a response email that same day, a PEBA customer service representative explained that Petitioner 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. (Ex. #4.)

By a Retirement Plan Enrollment form executed January 8, 2020, Petitioner formalized his request to end his ORP participation and enroll in SCRS (Ex. #5), and, by a 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 (Ex. #6). By a letter received February 24, 2020, Petitioner sought further review of the determination that he is not eligible to end his participation in the State ORP and enroll in SCRS (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 (Ex. #8). Petitioner now seeks review of that Determination in this contested case proceeding.

DISCUSSION

The Court should grant summary judgment in favor of Respondent PEBA in this matter. 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), SCRCP; 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 Respondent PEBA is entitled to judgment in its favor 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, 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 notwithstanding the fact that his initial enrollment in the State ORP occurred over ten years ago, because the aggregate number of months he has actively contributed to a State ORP account over that time has not yet reached five years. However, Petitioner's request to end his State ORP participation and enroll in SCRS fails as a matter of law such that summary judgment should be granted in favor of PEBA in this case.

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 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. 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 or some other measure of duration of participation. Id.

In the instant matter, 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. (Ex. #1.) 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 in August 2009. S.C. Code Ann. § 9-20-40(B). And, 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

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).

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. § 9-20-40(B). 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 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 the 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 this Court has the legal 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)). Notably, in two recent cases presenting similar claims, the Administrative Law Court granted summary judgment in favor of PEBA, reaffirming that, as a matter of law, the opportunity to switch from 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 Meleqkasim Shehu v. S.C. Pub. Employee Benefit Auth., Docket No. 19-ALJ-30-0206-CC (S.C. Admin. Law Ct. Sept. 9, 2019); Louis F. Dessau v. S.C. Pub. Employee Benefit Auth., Docket No. 19-ALJ-30-0178-CC (S.C. Admin. Law Ct. Dec. 2, 2019).

In sum, under the undisputed facts of this case and the plain language of the applicable statutes, 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.

MOTION

For the reasons set forth above, Respondent hereby requests that the Court issue an order granting summary judgment in its favor in the above-captioned case.

Respectfully Submitted,



Justin R. Werner
Deputy General Counsel
South Carolina Public Employee Benefit Authority
202 Arbor Lake Drive
Columbia, South Carolina 29223
Telephone: (803) 737-6894
E-mail: jwerner@peba.sc.gov

October 5, 2020
Columbia, South Carolina


STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Shawn Eubanks,)
)
 Petitioner,)
)
 v.)
)
 South Carolina Public Employee Benefit)
 Authority, South Carolina Retirement)
 Systems,)
)
 Respondent.)

CERTIFICATE OF SERVICE
DOCKET NO. 20-ALJ-30-0117-CC

I hereby certify that I am a Program Coordinator for the Respondent in the above-captioned matter and that, on this date, I served a copy of the foregoing Respondent's Notice of Motion and Motion for Summary Judgment on all parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows:

Shawn Eubanks, Esquire
[REDACTED]


Rebecca Haltiwanger
Program Coordinator, Legal Department
South Carolina Public Employee Benefit Authority
202 Arbor Lake Drive
Columbia, South Carolina 29223
Telephone: (803) 737-6811

October 5, 2020
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

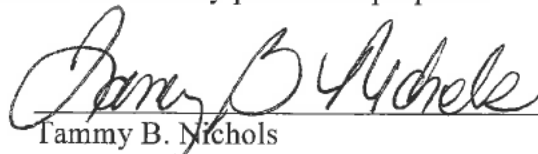
Shawn Eubanks,)
)
 Petitioner,)
)
v.)
)
South Carolina Public Employee Benefit)
Authority, South Carolina Retirement)
Systems,)
)
 Respondent.)
_____)

AFFIDAVIT

DOCKET NO. 20-ALJ-30-0117-CC


PERSONALLY appeared before me, Tammy B. Nichols, who first being duly sworn, states:

1. I, Tammy B. Nichols, am the Director of Retirement Systems Finance of the South Carolina Public Employee Benefit Authority ("PEBA"), the agency responsible for the administration of the South Carolina Retirement System.
2. As Director of Retirement Systems Finance, I am familiar with the regular practices by which PEBA maintains records of its activities, including records related to the participation of members in the State Optional Retirement Program and South Carolina Retirement System.
3. I hereby certify that the attached documents in Exhibits 1 through 8 are true and accurate copies of records contained in PEBA's retirement file for Petitioner Shawn Eubanks, with certain personal data identifiers redacted for identity protection purposes.



Tammy B. Nichols
Director of Retirement Systems Finance
South Carolina Public Employee Benefit Authority

Sworn to and subscribed before me this
22nd day of September 2020.



Notary Public for the State of South Carolina

My commission expires: 6/24/24

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

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

ACTION REQUESTED (Check One):

- NEW ENROLLEE (First-time membership)
- OPEN ENROLLMENT (Irrevocable election from State ORP)
- CHANGE OF EMPLOYER (Transfer)/DUAL EMPLOYMENT
- CHANGE OF INFORMATION
 - Name (Prior Name): _____
(ATTACH LEGAL DOCUMENT INDICATING NAME CHANGE)
 - Address
 - SSN (Old Number): _____
 - Date of Birth

SECTION I: EMPLOYEE INFORMATION (TO BE COMPLETED BY THE EMPLOYEE)

1. Last Name & Suffix Eubanks		2. First/ Middle Name Shawn D.		3. Social Security Number (ATTACH A COPY OF YOUR SOCIAL SECURITY CARD.) [REDACTED]	
4. Address [REDACTED]			5. City [REDACTED]		6. State SC
					7. ZIP+4 29376
8. Sex M	9. Date of Birth [REDACTED]	10. Telephone Number [REDACTED]	11. Have you ever been a member of the South Carolina Retirement Systems? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	12. If item 11 is "Yes", indicate the name(s) of your former employer: Did you withdraw your contributions? <input type="checkbox"/> No <input type="checkbox"/> Yes	
13. Do you currently have a pending refund request? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes			14. Are you now receiving or have you applied to receive a monthly benefit from any of the Retirement Systems' retirement plans? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> Application in Process		
15. Retirement Plan Election (CHOOSE ONE) <input type="checkbox"/> SCRS <input type="checkbox"/> PORS (See Instructions) <input checked="" type="checkbox"/> State ORP (If State ORP, please complete item 16.) <input type="checkbox"/> GARS - Senator (100.01) <input type="checkbox"/> GARS - Representative (100.02) <input type="checkbox"/> JSRS - Judge (001.00) <input type="checkbox"/> JSRS - Solicitor (002.00) <input type="checkbox"/> JSRS - Circuit Public Defender (003.00)			16. Select ORP Vendor <input type="checkbox"/> AIG Retirement <input type="checkbox"/> MetLife <input checked="" type="checkbox"/> TIAA-CREF <input type="checkbox"/> The Hartford		

17. An employee hired by an eligible employer (school district, higher education, technical college, state department, agency, bureau, commission, and institution) covered under the South Carolina Retirement System (SCRS), may elect to participate in either the traditional defined benefit plan, SCRS, or the optional defined contribution plan, State ORP. The election to participate in State ORP must be made within 30 calendar days after entry into service (date of hire).
If I do not make an election within the required time, I will be considered to have elected membership in SCRS. Participants in the State ORP assume all investment risk. The 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.
I understand that, unless a designated beneficiary is on file, my estate will be designated as my beneficiary until the Retirement Systems receives from me a properly executed beneficiary form.
My signature below indicates that my employer has explained the retirement plan options available to me and has provided me with access to information necessary to make an informed choice. My signature on this document confirms my retirement plan election as indicated in block 15 above.

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's Signature [Signature] Date 8/3/09 Witness _____
(Required only when signed by mark)

SECTION II: EMPLOYER INFORMATION (TO BE COMPLETED BY THE EMPLOYER)

A COPY OF THE EMPLOYEE'S SOCIAL SECURITY CARD MUST BE ATTACHED TO THIS FORM TO ENROLL THE MEMBER. THE NAME ON THE SOCIAL SECURITY CARD MUST MATCH THE NAME LISTED IN ITEMS 1-2 IN SECTION I OF THIS FORM.

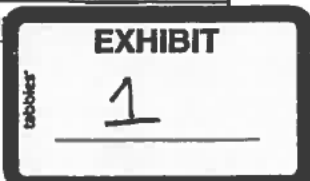
18. Employer Code 103	19. Employer Name Judicial Dept.	20. Please indicate if you are the employee's primary or secondary employer. (Annual member statements are sent to primary employers for distribution to members.) <input checked="" type="checkbox"/> Primary Employer <input type="checkbox"/> Secondary Employer	
21. Original Date of Hire with Employer listed in Items 18-19 8-3-09	22. Date of Membership 8-3-09	23. Employee's Position Title Law Clerk	24. Employee's Annual Salary \$39,160

25. I hereby certify that the employee listed in Section I of this form is eligible for the retirement plan selected.

Employer Signature [Signature] Date 8-3-09 803-734-1970
Work Telephone Number

For more information, please contact Customer Service at (800) 868-9002 (in state only), (803) 737-6800, or cs@

SEP 08 2009
POSTAL CENTER
Eubanks v. PEBA, Record on Appeal - 24



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

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

ACTION REQUESTED (Check One):

- NEW ENROLLEE (First-time membership)
 OPEN ENROLLMENT (Irrevocable election from State ORP)
 CHANGE OF EMPLOYER (Transfer)/DUAL EMPLOYMENT
 CHANGE OF INFORMATION
 Name (Prior Name): _____
(ATTACH LEGAL DOCUMENT INDICATING NAME CHANGE)
 Address _____
 SSN (Old Number): _____
 Date of Birth _____

SECTION I: EMPLOYEE INFORMATION (TO BE COMPLETED BY THE EMPLOYEE)

1. Last Name & Suffix Eubanks		2. First/ Middle Name Shawn David		3. Social Security Number (attach copy of Social Security card only if changing SSN) [REDACTED]	
4. Address [REDACTED]			5. City [REDACTED]		6. State SC
					7. ZIP+4 29201
8. Sex M	9. Date of Birth [REDACTED]	10. Telephone Number [REDACTED]	11. Have you ever been a member of the South Carolina Retirement Systems? <input type="checkbox"/> No <input checked="" type="checkbox"/> Yes		12. If item 11 is "Yes", indicate the name(s) of your former employer: Sc. State Judicial Dept. Did you withdraw your contributions? <input type="checkbox"/> No <input checked="" type="checkbox"/> Yes
13. Do you currently have a pending refund request? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes			14. Are you now receiving or have you applied to receive a monthly benefit from any of the Retirement Systems' retirement plans? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> Application in Process		
15. Retirement Plan Election (CHOOSE ONE) <input type="checkbox"/> SCRS <input type="checkbox"/> PORS (See Instructions) <input checked="" type="checkbox"/> State ORP (if State ORP, please complete item 16.) <input type="checkbox"/> GARS - Senator (100.01) <input type="checkbox"/> GARS - Representative (100.02) <input type="checkbox"/> JSRS - Judge (001.00) <input type="checkbox"/> JSRS - Solicitor (002.00) <input type="checkbox"/> JSRS - Circuit Public Defender (003.00)			16. Select ORP Vendor <input type="checkbox"/> VALIC <input type="checkbox"/> MetLife <input type="checkbox"/> TIAA-CREF <input checked="" type="checkbox"/> The Hartford		

17. An employee hired by an eligible employer (school district, higher education, technical college, state department, agency, bureau, commission, and institution) covered under the South Carolina Retirement System (SCRS), may elect to participate in either the traditional defined benefit plan, SCRS, or the optional defined contribution plan, State Optional Retirement Program (State ORP). The election to participate in State ORP must be made within 30 calendar days after entry into service (date of hire).
 If I do not make an election within the required time, I will be considered to have elected membership in SCRS. Participants in the State ORP assume all investment risk. The 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.
 I understand that, unless a designated beneficiary is on file, my estate will be designated as my beneficiary until the Retirement Systems receives from me a properly executed beneficiary form.
 My signature below indicates that my employer has explained the retirement plan options available to me and has provided me with access to information necessary to make an informed choice. My signature on this document confirms my retirement plan election as indicated in block 15 above.

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's Signature [Signature] Date 7/2/12 Witness _____
(Required only when signed by mark)

SECTION II: EMPLOYER INFORMATION (TO BE COMPLETED BY THE EMPLOYER)

18. Employer Code 610.00	19. Employer Name SC Department of Education	20. Please indicate if you are the employee's primary or secondary employer. (Annual member statements are sent to primary employers for distribution to members.) <input checked="" type="checkbox"/> Primary Employer <input type="checkbox"/> Secondary Employer	
21. Original Date of Hire with Employer listed in Items 18-19 07/02/2012	22. Date of Membership 07/02/2012	23. Employee's Position Title Education Assoc. II	24. Employee's Annual Salary \$68,000.00

25. I hereby certify that the employee listed in Section I of this form is eligible for the retirement plan selected.
 Employer Signature [Signature] Date 7-2-12 Work Telephone Number 803-734-8508

For more information, please contact Customer Services at 803-737-6800, 800-868-9002 (within SC or

EXHIBIT
2

RETIREMENT PLAN ENROLLMENT

EMPLOYEE INFORMATION

1. Last Name & Suffix EUBANKS		2. First/Middle Name SHAWN		3. Social Security Number [REDACTED]		
4. Address [REDACTED]			5. City [REDACTED]		3. State SC	7. ZIP Code 29201
8. Sex M	9. Date of Birth [REDACTED]	10. Telephone Number		15. Account C-ORP		
16. ORP Carrier Code 05 - METLIFE						
Date Received: 06-12-2019						
Email:						

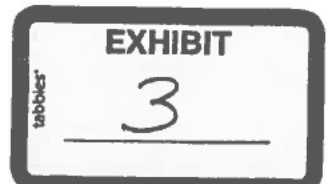
EMPLOYER INFORMATION

18. Employer Code 205.00	19. Employer Name OFFICE OF STATE TREASURER		20. Primary Employer Ind Y		
22. Date of Hire 06-11-2019		21. Position Title ATTORNEY IV		24. Annual Salary 85,000.00	
Employer Contact Name:					
Phone:					
Email:					

EES ENROLLMENT INFORMATION

Non-Membership Eligibility Certification:					
PORS Eligibility Certification:					
Meets Required Police/Firefighter Definitions?			Meets Required Hours and Salary Annually?		
Magistrate or Full-time Coroner Position?		Probate Judge Position?			
Employers Terminated From:					
Enrolled Thirty Days After the Hire Date (Retroactive)?			Plan Defaulted?		
Enrollment with Old Hire Date (Applied by Batch Job)?			Open Enrollment State ORP to SCRS?		
Retirement Plans Offered					
Employer Last Update 00-00-0000 0:00			Employee Last Update 00-00-0000 0:00		

Data Source: **SCEIS**
Transaction ID: **20190611JOR73201**



Veronica Berrian

From: Customer Service
Sent: Monday, December 16, 2019 12:17 PM
To: 'shawn.eubanks@sto.sc.gov'
Subject: RE: Retirement Contact Form

Thank you for your email.

Unfortunately, you are not eligible to switch from the State ORP to SCRS. In Section 9-20-40 (B) of the South Carolina Code of Laws, it states 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." Since your initial date of membership in the State ORP was 08/03/2009, you would have had to exercise that option between the State ORP open enrollment period from 2011-2014. The next opportunity for you to select SCRS would be if you have a new hire event where you have the option to make a retirement plan selection, you will have the ability to make a selection to stay in the State ORP plan or enroll in SCRS.

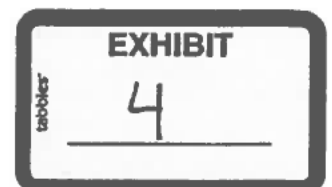
If you would like additional assistance, you may contact our Customer Contact Center at 803.737.6800 or 888.260.9430 (toll-free). For information regarding retirement benefits select option 2, and then 7, between the hours of 8:30 a.m. and 5:00 p.m. Monday-Friday to speak with a Benefits Counselor.

From: Customer Service
Sent: Monday, December 16, 2019 11:51 AM
To: Customer Service <cs@peba.sc.gov>
Subject: Retirement Contact Form

subject: Retirement Contact Form
Name: Shawn D. Eubanks
Customer ID: [REDACTED]
phone: [REDACTED]
Email: [REDACTED]

Comments: Hello, I would like to change from the ORP to SCRS. I have been employed for 3 state entities: July 2009 - July 2010 (Judicial Department) July 2012 - April 2015 (Department of Education) July 2019 - present (Treasurer's Office) Each of these times, I have chosen the ORP, but now I would like to switch to the SCRS. It is my understanding that there is an open enrollment starting in January, but it appeared that you have to be employed for more than 12 months before you can make a change during that time. Is that correct? I am concerned that after this year's open enrollment, I will no longer be eligible to switch to the SCRS because of the rule about being permanently opted out of SCRS if you've been in ORP for 5 years. How can I avoid that? I would appreciate some clarity on these two issues. Thanks, Shawn Eubanks

Customer Service
803.737.6800



RETIREMENT PLAN ENROLLMENT
S.C. Public Employee Benefit Authority
Retirement Benefits
Attention: Enrollment
202 Arbor Lake Drive
Columbia, SC 29223

ACTION REQUESTED (Check One):

- NEW ENROLLEE (First-time membership)
- OPEN ENROLLMENT (Irrevocable election from State ORP)
- CHANGE OF EMPLOYER (Transfer)/DUAL EMPLOYMENT
- CHANGE OF INFORMATION
 - Name (Prior Name): _____
(ATTACH LEGAL DOCUMENT INDICATING NAME CHANGE)
 - Address
 - SSN (Old Number): _____
 - Date of Birth

Print or type in black ink
Please read the instructions on Page 2 before completing this form.

SECTION I: EMPLOYEE INFORMATION (TO BE COMPLETED BY THE EMPLOYEE)

1. Last Name & Suffix Eubanks		2. First/ Middle Name Shawn David		3. Social Security Number <small>(attach copy of Social Security card only if changing SSN)</small> [REDACTED]	
4. Address [REDACTED]		5. City [REDACTED]		6. State SC	7. ZIP+4 29201
8. Gender M <small>M - Male F - Female</small>	9. Date of Birth [REDACTED]	10. Telephone Number [REDACTED]	11. Email Address [REDACTED]		
12. Have you ever been a member of PEBA's retirement systems?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes			
13. If item 12 is "Yes", indicate the name(s) of your former employer: Did you withdraw your contributions?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes			
14. Do you currently have a pending refund request?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes			
15. Are you now receiving or have you applied to receive a monthly benefit from any of PEBA's retirement systems?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> Application in Process			
16. Retirement Plan Election (CHOOSE ONE) <input checked="" type="checkbox"/> SCRS <input type="checkbox"/> PORS (See Instructions) <input type="checkbox"/> State ORP (If State ORP, please complete item 17.) <input type="checkbox"/> JSRS (Judge, Solicitor, Circuit Public Defender, or Administrative Law Court)				17. Select State ORP Vendor <input type="checkbox"/> MassMutual <input type="checkbox"/> MetLife <input type="checkbox"/> TIAA-CREF <input type="checkbox"/> VALIC	

18. An employee hired by an eligible employer (school district, higher education, technical college, state department, agency, bureau, commission, and institution) covered under the South Carolina Retirement System (SCRS), or individuals first elected to the S.C. General Assembly in and after November 2012, may elect to participate in either the traditional defined benefit plan, SCRS, or the optional defined contribution plan, State Optional Retirement Program (State ORP). The election to participate in State ORP must be made within 30 calendar days after entry into service (date of hire).

If I do not make an election within the required time, I will be considered to have elected membership in SCRS. Participants in the State ORP assume all investment risk. The 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.

I understand that, unless a designated beneficiary is on file, my estate will be designated as my beneficiary until PEBA receives from me a properly executed beneficiary form.

My signature below indicates that my employer has explained the retirement plan options available to me and has provided me with access to information necessary to make an informed choice. My signature on this document confirms my retirement plan election as indicated in block 16 above.

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 PUBLIC EMPLOYEE BENEFIT AUTHORITY. THE PUBLIC EMPLOYEE BENEFIT AUTHORITY RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS DOCUMENT.

Employee's Signature [Signature] Date 1/8/20 Witness _____
(Required only when signed by mark)

SECTION II: EMPLOYER INFORMATION (TO BE COMPLETED BY THE EMPLOYER)

19. Employer Code 205	20. Employer Name STO	21. Please indicate if you are the employee's primary or secondary employer. <input checked="" type="checkbox"/> Primary Employer <input type="checkbox"/> Secondary Employer			
22. Original Date of Hire with Employer listed in Items 19-20 6/11/2019	23. Date of Membership	24. Employee's Position Title Attorney IV	25. Employee's Annual Salary \$90,000		
26. I hereby certify that the employee listed in Section I of this form is eligible for the retirement plan selected.					
Employer Signature <u>[Signature]</u>		Date <u>1/8/2020</u>			
Work Telephone <u>784-3545</u>					

Please contact PEBA's Customer Contact Center with any questions at 803.737.6800 or 888.260.9430, or www.peba.sc.gov

EXHIBIT
5



PEBA
SC Retirement Systems
and State Health Plan

South Carolina Public Employee Benefit Authority

202 Arbor Lake Drive | Columbia, SC 29223

803.737.6800 | 888.260.9430

www.peba.sc.gov

February 7, 2020

Shawn D Eubanks
[REDACTED]

Dear Mr. Eubanks:

The following information is provided in response to your request that you be allowed to transfer from the State Optional Retirement Plan (ORP) to the South Carolina Retirement System (SCRS) defined benefit plan outside the annual open enrollment period.

In accordance with South Carolina State Statute, a State ORP participant may irrevocably elect to join SCRS 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. The Open Enrollment period is defined as the period from January first to March first of each year. Reference code sections 9-20-40(B) and 9-20-10(4) respectively.

This enrollment election is being denied because the form was not executed within the allowable time period. Your initial enrollment in the State ORP occurred on August 3, 2009, and therefore, under the provisions of the aforementioned statute, you are not currently eligible to join SCRS. The dates of the most recent Open Enrollment period are beyond your allowable fifth anniversary time frame. If you feel our information is incorrect, please provide our office with any additional information that you may have supporting your position.

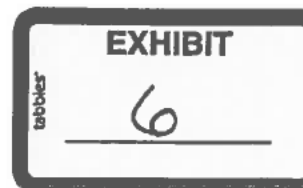
If you have questions, please contact our Customer Contact Center at (803) 737-6800 or toll free at (888) 260-9430.

Sincerely,

Michael Gregory
Retirement Financial Reporting
Enrollment Supervisor

Cc: Jordan Dominick, Benefits Administrator
Office of State Treasurer

Form 1332B



Serving those who serve South Carolina

Health insurance | Retirement benefits | 401(k) | 457(b) | Dental | Vision | Life insurance | Long term disability | Flexible spending accounts

February 24, 2020

VIA E-MAIL AND U.S. MAIL

Michael Gregory, Enrollment Supervisor
Retirement Financial Reporting
South Carolina Public Benefit Authority
202 Arbor Lake Dr.
Columbia, SC 29233

Re: Shawn Eubanks - SCRS Election Eligibility
State Treasurer's Office
DOB [REDACTED]

Dear Mr. Gregory,

I am in receipt of your letter dated February 7, 2020 in which you informed me that my request to enroll in the South Carolina Retirement System ("SCRS") was denied because my initial enrollment in the State Optional Retirement Plan ("ORP") was in 2009, and thus outside a five year time limit from that initial date in which I would have been able to elect to join the SCRS, and beyond which I am forever barred from such election.

I am writing to provide some additional information and background in hopes that PEBA will reconsider its denial and allow me to elect to enroll in the SCRS.

In August of 2009, I began my first attorney position with the South Carolina Judicial System as a law clerk for Hon. J. Mark Hayes. Law clerk positions traditionally last only one year, and as is common following a clerkship, after my year I entered private practice in August of 2010 and continued there until July 2012, when I accepted a position with the South Carolina Department of Education ("SCDE"). I worked at the SCDE until March of 2015, and then I returned to the private sector. In June 2019, I returned to work for state government at the State Treasurer's Office ("STO"), where I am currently employed.

Each of these employment terms — 1 year with Judge Hayes; 2 years 9 months with SCDE; and now 8 months with STO— I chose to enroll in the ORP. The total time I have been enrolled in the ORP amounts to just over four years.

I believe that, based on a reasonable interpretation of applicable law, these facts support my eligibility to elect to enroll in the SCRS at this time. The statute cited in this denial is S.C. Code Ann. § 9-20-40(B), which provides, in relevant part, 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....



The word “anniversary” is not defined, nor is it used, in any other place in Title 9, Chapter 20. The word anniversary, in typical usage, indicates that something has continued to happen for a year (i.e. a wedding anniversary indicates that a couple remains married; a work anniversary indicates that an individual remained employed, etc.).

The plain meaning of the phrase “anniversary of the person’s initial enrollment” indicates that the enrollment and participation in the ORP would have continued during that time, and if the person’s ORP participation stopped or paused, so too would the passage of “anniversaries.” This interpretation is supported by the language of PEBA’s own website, which summarizes S.C. Code Ann. § 9-20-40(B) as follows:

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).

PEBA, “State ORP Annual Open Enrollment,” Feb. 24, 2020, peba.sc.gov/sorpopenenrollment (emphasis added).

Additionally, the phrase “before the fifth anniversary of the person’s initial enrollment” can be contrasted with, and differentiated from “within” a five year time period (See S.C. Code Ann. § 9-20-40(A) “...within thirty days after entry into service...”; “within the required time.”) This different terminology for such timelines suggests that the legislative intent for enrollment in SCRS should be viewed differently than the simple passage of calendar days and years.

Finally, even if the above interpretation fails, it is not clear from the language of S.C. Code § 9-20-40(B) that a State ORP participant is forever barred from electing to join the SCRS after his fifth anniversary of participation. The statute establishes only that an ORP participant “may irrevocably elect” to join SCRS during this period; it does not explicitly or implicitly limit all ORP participants’ elections to join SCRS thereafter.

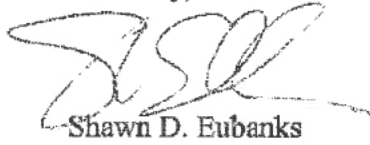
Based on the reasonable interpretation above, I am in my fourth year of participation in the ORP, and my last year of eligibility to enroll in the SCRS, but I am still eligible to enroll. I ask that you reconsider your decision to deny my enrollment election, and allow me to enroll in the SCRS, effective this year.

In closing, please know that my desire to seek enrollment in SCRS is an indication of our recent family decision for me to remain in state government employment for the “long haul.” We believe that the SCRS would be most beneficial for my family and me in the long-term.

Your decision means a great deal to us, and I appreciate your careful consideration of this letter in support of my election to participate in the SCRS.

Michael Gregory
February 24, 2020
Page 3

Sincerely,



Shawn D. Eubanks

cc: Jordan Dominick, STO Human Resources



FINAL AGENCY DETERMINATION

NO. 20-009

In Re Shawn Eubanks, SSN XXX-XX-██████

This Final Agency Determination is issued in accordance with the South Carolina Retirement Systems Claims Procedures Act set out at S C Code Ann §§ 9-21-10 et seq. (2019) and the South Carolina Retirement Systems Claims Procedure (2005) In this matter, Shawn Eubanks (“Claimant”) requests that the South Carolina Public Employee Benefit Authority (“PEBA”) reconsider its determination that he is not eligible to end his participation in the State Optional Retirement Program and elect membership in the South Carolina Retirement System

BACKGROUND

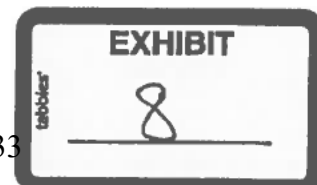
Claimant Shawn Eubanks is a participant in the State Optional Retirement Program (“State ORP”), a defined contribution retirement plan that is available to certain state employees and employees of school districts and state colleges in lieu of membership in the South Carolina Retirement System (“SCRS”) defined benefit pension plan As set forth in detail below, Claimant 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, Claimant 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 State ORP, Claimant designated TIAA-CREF as the vendor for his ORP account Notably, the information provided on the form immediately above Claimant’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, Claimant 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, Claimant returned to covered employment under the State ORP upon being hired by the South Carolina Department of



Education on July 2, 2012. By a Retirement Plan Enrollment executed that same day, Claimant reenrolled in the State ORP in connection with his employment with the Department of Education, selecting The Hartford as the vendor for his ORP account. The enrollment form signed by Claimant contained the same notice provided on his 2009 enrollment form regarding the irrevocability of his election to participate in the State ORP. As a result of that reenrollment, Claimant continued his participation in the State ORP in connection with his employment with the Department of Education from 2012 to 2015.

Most recently, Claimant 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. By an electronic Retirement Plan Enrollment form submitted on June 12, 2019, Claimant elected to continue his participation in the State ORP in his employment with the Treasurer's Office, selecting MetLife as the vendor for his account. Approximately six months later, by an email to PEBA on December 16, 2019, Claimant inquired about his eligibility to end his participation in the State ORP and enroll in SCRS during the upcoming 2020 open enrollment period. By a response email that same day, a PEBA customer service representative explained that Claimant 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.

By a Retirement Plan Enrollment form executed January 8, 2020, Claimant formalized his request to end his ORP participation and enroll in SCRS, and, by a letter dated February 7, 2020, PEBA's Enrollment Department notified Claimant that his enrollment 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. By a letter received February 24, 2020, Claimant sought further review of the determination that he is not eligible to end his participation in the State ORP and enroll in SCRS. This Final Agency Determination is issued in response to that request for review.

DISCUSSION

In this matter, Claimant 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, Claimant 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 number of months

he has actively contributed to a State ORP account over that time has not yet reached five years. However, as set forth below, I find that Claimant's request to end his State ORP participation and enroll in SCRS was properly denied by PLBA.

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]." 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 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.¹ 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 or some other measure of duration of participation. Id.

In the instant matter, Claimant'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, Claimant's eligibility to end his

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).

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. And, although Claimant 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. § 9-20-40(B). Accordingly, once Claimant 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 Claimant 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 applicable statutes. Further, given the nature of the statutory requirements at issue in this matter, PEBA does not have the legal authority to ignore the plain language of the ORP statutes and to allow Claimant to end his ORP participation and 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)), see also, e.g., Meleqkasim Shchu v. S.C. Pub. Employee Benefit Auth., Docket No. 19-ALJ-30-0206-CC (S.C. Admin. Law Ct. Sept. 9, 2019), Louis F. Dessau v. S.C. Pub. Employee Benefit Auth., Docket No. 19-ALJ-30-0178-CC (S.C. Admin. Law Ct. Dec. 2, 2019). In sum, because Claimant is no longer eligible to end his State ORP participation and join SCRS under Section 9-20-40(B), his election to participate in the State ORP is irrevocable and cannot now be rescinded in favor of an election to enroll in SCRS so long as he remains in his current employment.

CONCLUSION

For the foregoing reasons, I find that that Claimant's request to end his participation in the State ORP and enroll in SCRS was properly denied by PEBA



Peggy G. Boykin, CPA
Executive Director

May 4, 2020
Columbia South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Shawn Eubanks	)	DOCKET NO.: 20-ALJ-30-0117-CC
)	
)	
Petitioner,	)	PETITIONER’S NOTICE OF
	)	MOTION AND MOTION FOR
v.	)	SUMMARY JUDGMENT
	)	AND
South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems,	)	RESPONSE TO RESPONDENT’S
	)	MOTION FOR SUMMARY
	)	JUDGMENT
Respondent.)	
)	
<hr style="width: 40%; margin-left: 0;"/>)	

TO: JUSTIN R. WERNER, ESQ., ATTORNEY FOR RESPONDENT

PLEASE TAKE NOTE that Petitioner Shawn Eubanks (“Petitioner”) hereby moves before this Court for an order granting summary judgment in favor of Petitioner pursuant to Rule 56, SCRCF and Rules 19(A) and 68, S.C. R. Admin. Law Ct., on the grounds that there is no genuine issue as to any material fact in this case and Petitioner is entitled to judgment as a matter of law. This memorandum shall also serve as Petitioner’s Response to Respondent’s Motion for Summary Judgment, and is timely served pursuant to Rule 19, S.C. R. Admin. Law Ct.

INTRODUCTION

At issue in this case is whether Petitioner may elect to join the South Carolina Retirement System (“SCRS”), after being initially enrolled and participating in the State Optional Retirement Program (“State ORP”) for a period of more than one year but less than five years.

FACTS

Petitioner Shawn Eubanks is a current employee of an agency of the State of South Carolina, and seeks to elect to join the South Carolina Retirement System (“SCRS”) after timely

filing a request with Respondent South Carolina Public Employee Benefit Authority (“PEBA”) to do so.

Over the course of his career, Petitioner has been employed by three agencies of the State of South Carolina. First, from August 2009 to July 2010, Petitioner served as a law clerk to the Hon. J. Mark Hayes, II with the South Carolina Circuit Court. Eubanks Aff. ¶ 3(a). Second, Petitioner served as Deputy General Counsel for the South Carolina Department of Education from July 2012 to March 2015. Eubanks Aff. ¶ 3(b). Third, Petitioner served and continues to serve as Deputy General Counsel for the State Treasurer’s Office, beginning in June 2019. Eubanks Aff. ¶ 3(c). During each of these periods, Petitioner was enrolled in the State Optional Retirement Program (“State ORP”).¹

On January 8, 2020, Petitioner timely submitted an election to join the SCRS. Eubanks Aff. ¶ 2. At the time Petitioner made the election, he had accumulated approximately four years and two months of enrollment in State ORP. See Eubanks Aff. ¶ 3. It is undisputed that, at the time of Petitioner’s election to join SCRS, Petitioner’s cumulative time of “enrollment” as a “State ORP participant” was more than one year but less than five years. See S.C. Code § 9-20-40(B). However, on May 4, 2020, PEBA issued Final Agency Determination No. 20-009, erroneously denying Petitioner’s election to join SCRS, citing S.C. Code Ann. § 9-20-40.

Petitioner timely filed the present action, asking this Court to order PEBA to approve Petitioner’s election to join SCRS, and to process Petitioner’s request retroactively, given credit for the time lost which would have been properly accrued in SCRS if PEBA had followed the law.

¹ An individual’s State ORP funds are transferrable to certain retirement accounts offered by private employers, such as 401(k)’s and IRA’s, 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 private employment in the future. By comparison, an individual who initially elects to join SCRS can *never* opt in to the State ORP.

STANDARD

In contested case proceedings, the South Carolina Administrative Law Court has authority to apply Rule 56, SCRCP, which provides that a “party seeking to recover upon a claim” may move for summary judgment. A motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. See Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 544 (1993).

ARGUMENT

I. PETITIONER IS ENTITLED TO ELECT TO JOIN THE SCRS BECAUSE HIS REQUEST TO DO SO WAS TIMELY MADE, AND PEBA VIOLATED S.C. CODE ANN. § 9-20-40 BY DENYING PETITIONER’S ELECTION.

Petitioner 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, and before the fifth anniversary of his enrollment in the State ORP, and was therefore timely made under S.C. Code Ann. § 9-20-40(B).

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. State v. Scott, 351 S.C. 584 (2002). The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct.App.2004). A statute must receive a practical and reasonable interpretation consistent with the “design” of the legislature. Smith v. South Carolina Ins. Co., 350 S.C. 82 (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. South Carolina Pub. Serv. Comm'n,

298 S.C. 179, 184 (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 and Pardon Servs., 357 S.C. 327 (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.” State v. Gordon, 356 S.C. 143 (2003).

Applying these principles, S.C. Code Ann. § 9-20-40(B) plainly indicates that a State ORP participant may elect to join SCRS during the open enrollment period that falls after one year of participation, and before five years of participation in the State ORP:

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....

The plain meaning of the phrase “anniversary of the [State ORP participant’s] initial enrollment” indicates that the time period runs only with enrollment and participation in the ORP, and if the person’s ORP participation stops, so too does the passage of “anniversaries.” *Id.* The word “participant” denotes active, present participation or enrollment in the State ORP. The word “enrollment,” in this context denotes a continued state of being enrolled.² And “anniversary” denotes a date before 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. See Merriam–Webster's Collegiate Dictionary 50 (11th ed.2007) defining “anniversary” as “a date that follows such an event by a specified period of time measured in units other than years.”

² As discussed more fully below, the word “enrollment” must be contrasted against, and is not used interchangeable with “elect” or “election” which, in the context of the relevant statute, indicates the moment a choice or selection is made. See S.C. Code Ann. § 9-20-40(B). As used in the statute, Petitioner is currently enrolled in the State ORP, and his *enrollment* has covered a period of time greater than one year but less than five years; however, he first *elected* to join the State ORP on August 3, 2009.

At the time Petitioner filed his election to join SCRS, PEBA's guidance indicated precisely the same construction of the statute's plain language:

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).

"State ORP Annual Open Enrollment," Feb. 24, 2020, peba.sc.gov/sorpopenrollment (emphasis added); see also Eubanks Aff. ¶¶ 5-6.³ Thus, according to PEBA, for the 2020 open enrollment period, the timeframe for a State ORP participant to opt in to the SCRS was dependent upon the length of time of "participation" in the State ORP.

PEBA now contends that S.C. Code Ann. § 9-20-40(B) requires a person to elect to join the SCRS within five years of his first *election* to join the State ORP, regardless of the length of his enrollment or participation the State ORP.⁴

PEBA's interpretation ignores the plain language of the whole statute in question. Notably, the statute does not establish a deadline to join SCRS based on a person's "initial election."⁵ The General Assembly chose different verbiage with a different meaning: "initial enrollment." The moment of "election" is clearly distinguished from the continued state of "enrollment" referenced in S.C. Code Ann. § 9-20-40(B). The word "elect" or "election" refers to the act of selecting the State ORP or the SCRS. S.C. Code § 9-20-40(A) plainly defines the act of election as a moment

³ PEBA removed this language from its website following Petitioner's appeal.

⁴ PEBA references two cases in its brief which "reaffirm that, as a matter of law, the opportunity to switch from the State ORP to SCRS without a severance of employment runs from the date of the participant's initial enrollment." Notably, in both of those cases, Summary Judgment was granted after the petitioners did not file any opposition to PEBA's motion, and none of the substantive arguments asserted by the present Petitioner appear to have been advanced or addressed at any stage.

⁵ Using the parlance of the statute itself, PEBA's erroneous interpretation might be valid if, for example, the phrase "within five years following the person's initial *election*" was used in S.C. Code Ann. § 9-20-40(B) instead of "*fifth annual anniversary* of the person's initial *enrollment*." However, the statute says no such thing, and PEBA's interpretation fails.

in time: “an election... is effective on the date of employment.” The statute goes on to use “election” to establish a specific time frame “eligible employees shall elect to join [SCRS or State ORP] within thirty days after entry into service...” *Id.*

The General Assembly intended “election” and “enrollment” to have different meanings, and employed the terms accordingly. These 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 and Pardon Servs., 357 S.C. 327 (Ct. App. 2004).

Additionally, 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 State ORP, it would have used different language entirely. In fact, the General Assembly did exactly that when it established another deadline in the same section of statute, requiring action “...within thirty days after entry into service...”. S.C. Code Ann. § 9-20-40(A). Compare this to the statute at issue, which provides “A State ORP participant may irrevocably elect to join the [SCRS]... before the fifth annual anniversary of the person's initial enrollment in the State ORP,” and it is clear that the legislative intent is for the deadline to be connected to participation and enrollment. S.C. Code Ann. § 9-20-40(B). Thus, 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.

PEBA’s current interpretation also creates the absurd 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 generally expected) for a period of four or more years, and in so doing, be forever banned from returning to State employment (having gained valuable work experience) and

participating in the SCRS, one of the State's most attractive recruitment tools. This is clearly not the effect of the statute, nor could it have been the intent of the South Carolina General Assembly.

Based on a proper interpretation of S.C. Code Ann. § 9-20-40(B), Petitioner is entitled to elect to join the SCRS. At the time of Petitioner's request to participate in SCRS, he had accrued more than 12 months, but less than 60 months of enrollment in the State ORP. His request was made during an open enrollment period which fell within this one- to five-year period of State ORP participation. Therefore, his request was timely made pursuant to the statute, and his election to participate in SCRS cannot be denied as untimely. Accordingly, Summary Judgment in favor of Petitioner is warranted.

Respectfully submitted,

By: 

Shawn D. Eubanks (S.C. Bar No. 78370)

Petitioner

1200 Senate St., Suite 214

Columbia, SC 29201

Telephone: 803-734-2623

Facsimile: 803-734-2690

shawn.eubanks@sto.sc.gov

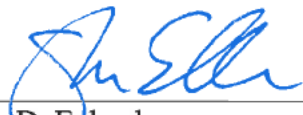
October 13, 2020
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Shawn Eubanks	)	DOCKET NO.: 20-ALJ-30-0117-CC
)	
)	
Petitioner,)	
)	
v.	)	CERTIFICATE OF SERVICE
)	
South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems,)	
)	
)	
Respondent.)	
_____)	

I certify that, on this date, I served a copy of the foregoing Petitioner’s Notice of Motion and Motion for Summary Judgment and Response to Respondent’s Motion for Summary Judgment on all parties to this matter on October 13, 2020 by placing the same in the United States Mail, postage paid, and addressed as follows:

Justin R. Werner, Esq.
Deputy General Counsel
South Carolina Public Employee Benefit Authority
202 Arbor Lake Dr.
Columbia, SC 29223

By: 
Shawn. D. Eubanks
1200 Senate St., Suite 214
Columbia, SC 29201

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Shawn Eubanks	)	DOCKET NO.: 20-ALJ-30-0117-CC
)	
)	
Petitioner,)	
)	
v.	)	AFFIDAVIT OF
	)	SHAWN EUBANKS
South Carolina Public Employee Benefit)	
Authority, South Carolina Retirement Systems,)	
)	
)	
Respondent.)	
_____)	

Personally appearing before me, Shawn Eubanks, who first being duly sworn, states as follows:

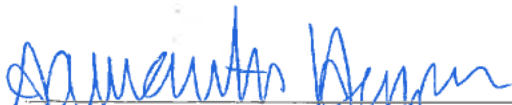
1. I, Shawn Eubanks, am an employee with the South Carolina State Treasurer’s Office, currently enrolled in the State Optional Retirement Program (“State ORP”) with the Public Employee Benefit Authority.
2. I made an election to join the South Carolina Retirement System (“SCRS”) on January 8, 2020 during the 2020 open enrollment period.
3. My election to join the SCRS was timely made during the open enrollment period, and I believe I am entitled to join SCRS.
4. I have, to the best of my recollection, been previously enrolled in the State ORP during the following periods:
 - a. From August 2009 to July 2010, while employed with the South Carolina Judicial System;
 - b. From July 2012 to March 2015, while employed with the South Carolina Department of Education;

- c. From June 2019 to present, while employed with the South Carolina State Treasurer's Office.
5. As of the date of my election to join the SCRS on January 8, 2020, I had accumulated approximately four years and two months of participation and enrollment in the State ORP.
6. On February 24, 2020, I personally observed the following guidance on the South Carolina Public Employee Benefit Authority website at peba.sc.gov/sopropenenrollment, regarding the eligibility of State ORP participants to elect to join the SCRS: "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)."
7. The above-referenced webpage has, as of the date of this affidavit, been removed entirely.



Shawn Eubanks, Petitioner

Sworn to and subscribed before me this
12 day of October 2020.



Notary Public for the State of South Carolina

My commission expires: Jan 2, 2021

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Shawn Eubanks	)	DOCKET NO.: 20-ALJ-30-0117-CC
)	
)	
Petitioner,	)	PETITIONER’S NOTICE OF
	)	MOTION AND MOTION FOR
v.	)	RECONSIDERATION
)	
South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems,)	
)	
)	
Respondent.)	
_____)	

TO: JUSTIN R. WERNER, ESQ., ATTORNEY FOR RESPONDENT

PLEASE TAKE NOTE that, pursuant to Rule 59(e), and Rules 19(A) and 68, S.C. R. Admin. Law Ct., Petitioner Shawn Eubanks (“Petitioner”) hereby moves before this Court for reconsideration, alteration, or amendment of the Court’s Order dated and received by Petitioner on November 5, 2020, attached as EXHIBIT A, denying Petitioner’s Motion for Summary Judgment and granting Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems (“PEBA”) Motion for Summary Judgment. This motion is made on the following grounds:

1. Petitioner asks the Court to reconsider its ruling that Petitioner is ineligible to elect to join the South Carolina Retirement System (“SCRS”), and amend its Order to specifically determine that Petitioner has accumulated more than one year but less than five years of “enrollment” in the State Optional Retirement Program (“State ORP”), and that the length of time since Petitioner’s initial election is immaterial to the eligibility requirements of S.C. Code Ann. § 9-20-40(B).
2. Petitioner asks the Court to reconsider its ruling that Petitioner is ineligible to elect to join the SCRS, and amend its Order to specifically determine that State benefits law, including S.C. Code Ann. § 9-20-40(B), should be liberally construed in favor of Petitioner’s participation in SCRS.

3. To the extent that the meaning of S.C. Code Ann. § 9-20-40(B) is ambiguous when applied to the facts of the present case, Petitioner asks the Court to reconsider its ruling and amend its Order to specifically determine that Petitioner is eligible to elect to join SCRS in light of PEBA's own agency interpretation as set forth on its website during the relevant open enrollment period.

FACTS

Petitioner reasserts the facts as articulated in his Motion for Summary Judgment, and provides a brief summary herein. Petitioner's first election to participate in the State ORP occurred in August 2009. Petitioner served with the Judicial Department for one year between 2009 and 2010, the South Carolina Department of Education for approximately two years and eight months between 2012 and 2015, and joined the State Treasurer's Office in June 2019. These periods constitute the entirety of Petitioner's employment with the State of South Carolina, as well as his enrollment in the State ORP. On January 8, 2020, Petitioner timely submitted an election to join the SCRS. It is undisputed that the total time of Petitioner's enrollment as a State ORP participant prior to his election amounts to a period of more than one year and less than five years.

STANDARD

In contested case proceedings, the South Carolina Administrative Law Court has authority to apply Rule 59(e), SCRCP, which allows a party to move for an order altering or amending a judgment. Pursuant to Rule 59, upon motion, a court may, in its discretion, "amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

ARGUMENT

- I. **PETITIONER IS ENTITLED TO ELECT TO JOIN THE SCRS BECAUSE HE HAS ACCUMULATED MORE THAN ONE YEAR BUT LESS THAN FIVE YEARS OF "ENROLLMENT" IN THE STATE ORP, AND THE LENGTH OF TIME SINCE PETITIONER'S INITIAL ELECTION IS IMMATERIAL TO THE ELIGIBILITY REQUIREMENTS OF S.C. CODE ANN. § 9-20-40(B).**

Petitioner 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, and before the fifth anniversary of his enrollment in the State ORP, and was therefore timely made under S.C. Code Ann. § 9-20-40(B).

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. State v. Scott, 351 S.C. 584 (2002). A statute must receive a practical and reasonable interpretation consistent with the “design” of the legislature. Smith v. South Carolina Ins. Co., 350 S.C. 82 (Ct.App.2002). “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 and Pardon Servs., 357 S.C. 327 (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.” State v. Gordon, 356 S.C. 143 (2003).

In its Order, the Court adopts PEBA’s argument that S.C. Code Ann. § 9-20-40(B) requires a person to elect to join the SCRS within five years immediately following his initial *election* to join the State ORP, regardless of the length of his enrollment or whether he was even a participant of the State ORP during that period. PEBA’s argument, however, conflates the meaning of the statutory terms “enrollment” and “election,” and fails to give effect to the intent of the legislature.

S.C. Code Ann. § 9-20-40(B) provides 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....

The General Assembly chose to establish a deadline to join SCRS based on a person's “initial enrollment.” The term “enrollment,” is explicitly tied to present participation in the ORP because the statute is discussing the right of a “State ORP participant” to elect to join the SCRS.

PEBA's interpretation requires the terms "election" and "enrollment" to mean exactly the same thing; however, the moment of "election" is distinguished from the continued state of "enrollment," and the rules of statutory construction require that those meanings be employed accordingly. The word "elect" or "election" refers to the act of selecting the State ORP or the SCRS. S.C. Code § 9-20-40(A) defines the act of election as a moment in time: "an election... is effective on the date of employment." The General Assembly's use of "enrollment" rather than "election" indicates that the time period runs only during enrollment or participation. Thus, the date of initial election is immaterial. These 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 and Pardon Servs., 357 S.C. 327 (Ct. App. 2004).

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 State ORP, it would have used different language entirely. In fact, the General Assembly did exactly that when it established another deadline in the same section of statute, requiring action "...within thirty days after entry into service...". S.C. Code Ann. § 9-20-40(A).

Therefore, Petitioner 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, and before the fifth anniversary of his enrollment in the State ORP, and was therefore timely made under S.C. Code Ann. § 9-20-40(B).

II. STATE BENEFITS LAW SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF PETITIONER, AND A REASONABLE CONSTRUCTION ENTITLES PETITIONER TO PARTICIPATION IN SCRS.

Petitioner is entitled to a liberal construction of S.C. Code Ann. § 9-20-40(B), which would favor his election to join the SCRS.

The South Carolina Supreme Court has stated “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 (2000).

In the Court’s Order, the Court adopts, *verbatim*, PEBA’s assertions regarding the application of S.C. Code Ann. § 9-20-40, without any discussion or finding as to whether the statute is susceptible of a reasonable construction which favors State employees. Petitioner has advanced a reasonable interpretation which remains true to the language and meaning of the statute, while preserving, to the greatest extent possible, the rights and access of State employees to elect into the SCRS. PEBA’s published guidance supports Petitioner’s position.

PEBA’s contention in this particular case, in addition to being erroneous according to the actual language of the statute, burdens rather than benefits State employees’ access to SCRS by unjustifiably counting their time employed outside State government against them. For example, PEBA’s interpretation creates the absurd 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 generally expected) for a period of four or more years, and in so doing, be forever banned from returning to State employment and participating in the SCRS, one of the State’s most attractive recruitment tools.

The State of South Carolina benefits greatly from employees who obtain outside experience and then return to State employment. Yet PEBA seeks to exclude these individuals’ election to join SCRS, when the plain language supports a construction that would make many of them eligible to do so. PEBA’s proposed construction does not favor “those to be benefitted” or

“the objective sought to be accomplished,” while Petitioner’s construction favors both, and is therefore entitled to deference by this Court. See Stuckey, 339 S.C. at 401 (2000).

Accordingly, Petitioner’s election to join SCRS must be held as timely made under S.C. Code Ann. § 9-20-40(B), in light of a reasonable, yet appropriately liberal construction of said statute “in favor of those to be benefitted and the objective sought to be accomplished,” Stuckey, 339 S.C. at 401 (2000).

III. TO THE EXTENT THAT S.C. CODE ANN. § 9-20-40(B) IS AMBIGUOUS, PEBA’S OWN AGENCY INTERPRETATION CLARIFIES THE MEANING OF THE STATUTE AND ENTITLES PETITIONER TO ELECT TO JOIN SCRS.

To the extent that the statute in question is ambiguous 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 Petitioner to elect to join SCRS.

In its Order, the Court correctly notes that, in applying statutes, it 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’tl. Control, 411 S.C. 16, 32 (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.*

Petitioner contends that the plain language of the statute clearly entitled him to join the SCRS because his cumulative enrollment in the State OPR is less than five years. However, to the extent this Court desires assistance interpreting S.C. Code Ann. § 9-20-40(B), it need look no further than the guidance published on PEBA’s own website during the relevant open enrollment period. At the time Petitioner filed his election to join SCRS, PEBA’s guidance indicated precisely the same construction of the statute’s plain language which Petitioner now advances:

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).

“State ORP Annual Open Enrollment,” Feb. 24, 2020, peba.sc.gov/sorpopenenrollment (emphasis added).¹ Notably, this continues to be PEBA’s published interpretation, as its website currently provides the exact same interpretation in reference to the 2021 open enrollment. EXHIBIT B (November 6, 2020, peba.sc.gov/state-orp-enrollment).

According to PEBA, for the 2020 open enrollment period, the timeframe for a State ORP participant to opt in to the SCRS was dependent upon the length of time of “participation” in the State ORP. Based on PEBA’s guidance, the word “enrollment” as used in S.C. Code Ann. § 9-20-40(B) is interpreted to mean “participation”-- exactly the interpretation which Petitioner has argued is the appropriate plain language construction. 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 (2014). Further, the interpretation is “reasonable and consistent with its statutory authority.” *Id* at 35 (2014). If the Court finds that the terms “election” and enrollment” cannot be distinguished, then it must consider and give deference to this published guidance from PEBA.²

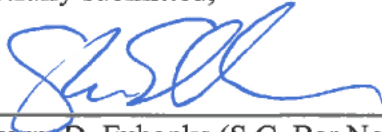
Accordingly, based on PEBA’s published guidance and interpretation of S.C. Code Ann. § 9-20-40(B), Petitioner is entitled to join SCRS because he has “at least 12 months, but no more than 60 months, of participation from [his] initial enrollment in the State ORP.”

¹ PEBA removed this language from its website following Petitioner’s appeal.

² PEBA references Petitioner’s December 16, 2019 inquiry regarding his eligibility to elect to join the SCRS. While Petitioner does not dispute the fact that he did make such inquiry, the response PEBA provided to him at that time is irrelevant to this action because, as this Court has noted time and again, Petitioner has no right to rely on statements of PEBA employees, and their responses carry no weight or precedent, and receives no deference whatsoever.

Accordingly, Petitioner requests that this Court reconsider its Order denying Petitioner's Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment, or otherwise alter or amend said Order to specifically address the matter raised herein.

Respectfully submitted,

By: 
Shawn D. Eubanks (S.C. Bar No. 78370)
Petitioner
1200 Senate St., Suite 214
Columbia, SC 29201
Telephone: 803-734-2623
Facsimile: 803-734-2690
shawn.eubanks@sto.sc.gov

November 10, 2020
Columbia, South Carolina

EXHIBIT A

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Shawn Eubanks,

Petitioner,

vs.

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

Respondent.

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

**ORDER GRANTING
RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT**

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

FILED
November 5, 2020

SC ADMIN. LAW COURT

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

November 5, 2020
Columbia, South Carolina

FILED

November 5, 2020

SC ADMIN. LAW COURT

EXHIBIT B

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State ORP annual open enrollment

The annual open enrollment period for all participants of the State Optional Retirement Program (/employees/state-orp) (State ORP) is January 1 to March 1 of each year. During this period, State ORP participants may change their State ORP service provider or, if eligible, may irrevocably elect to participate in the South Carolina Retirement System (/employees/scrs) (SCRS).

State ORP service provider change

If you wish to change service providers, you should do so through Member Access. If you are unable to change your service provider online through Member Access

(<https://online.retirement.sc.gov/MemberAccess/welcome>), you may do so by completing Form 1162 (<https://forms.retirement.sc.gov/formGenericGet.do?formNum=web1162.xdp>).

If you change service providers during annual open enrollment, you may transfer your existing account balance, subject to the current State ORP service provider's contractual limitations, to the new service provider. In order to do so, you must initiate the process by contacting your prior service

provider and requesting the appropriate forms. The transfer of funds from the old service provider to the new service provider does not have to be completed during the annual open enrollment period. You may also choose to leave funds on account with your prior service provider.

Irrevocable election to participate in SCRS

State ORP participants are eligible to change from the State ORP to SCRS during the 2021 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, 2016, and March 1, 2020).

If you do not change to SCRS within the allotted time, you will, by default, continue State ORP participation. If you change to SCRS during the allotted time, you may purchase service credit for all or a portion of your State ORP participation at any time after joining SCRS.

The cost calculation is based in part on your current age and service credit, as well as your career highest fiscal year earnable compensation at the time PEBA receives the service purchase request. The cost, which is actuarially determined, will not be less than 16 percent of your career highest fiscal year compensation for each year purchased. State ORP participation that is 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 established State ORP participation will be considered for possible inclusion in the calculation of your average final compensation.

If you wish to irrevocably elect to participate in SCRS, you should request that your employer submit an SCRS enrollment through Electronic Employer Services (<https://ees.retirement.sc.gov/ees/logon.jsp>) (EES). EES will prompt your employer to confirm that the enrollment is an irrevocable election to change from State ORP to SCRS. You will then be contacted to confirm the change. If your employer is unable to submit an enrollment through EES, you should complete a Form 1100 (<https://forms.retirement.sc.gov/formGenericGet.do?formNum=web1100.xdp>) , and return it to PEBA for processing.

Questions

If you have any questions, please contact our Customer Contact Center (/contact).

Quick links

> (/state-orp) State ORP overview (/state-orp)

> *Select Your Retirement Plan* guide

> (<https://youtu.be/P2dU-HCRI-0>) It's Your Choice: SCRS or State ORP video (<https://youtu.be/P2dU-HCRI-0>)

> (https://youtu.be/G5oKJAdNnk?list=PLhoB8-x99RzCjG-lqGaLRtFntfM_J0Qxs) State ORP at a Glance video (https://youtu.be/G5oKJAdNnk?list=PLhoB8-x99RzCjG-lqGaLRtFntfM_J0Qxs)



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[Business opportunities \(https://procurement.sc.gov/vendor/contract-ops/other-solicitations/peba\)](https://procurement.sc.gov/vendor/contract-ops/other-solicitations/peba)

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S.C. Code of Laws (<http://www.scstatehouse.gov/code/statmast.php>)

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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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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Columbia, South Carolina
June 1, 2020