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.

FINAL REPLY OF APPELLANT

Shawn D. Eubanks (S.C. Bar No. 78370)
1200 Senate St., Suite 214
Wade Hampton Office Building
Columbia, SC 29201
(803) 734-2623
shawn.eubanks@sto.sc.gov
Attorney/Appellant

Justin R. Werner, Esq.
South Carolina Public Benefit Authority
Post Office Box 11960
Columbia, South Carolina 29211
(803) 737-6894
Attorney for Respondent

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ARGUMENT

I. Appellant timely elected to join the SCRS prior to his fifth anniversary of enrollment in the State ORP, pursuant to the correct interpretation and application of S.C. Code Ann. § 9-20-40.

Contrary to PEBA's assertions in its initial brief, Appellant's interpretation of S.C. Code Ann. § 9-20-40(b) is the correct application of the plain language of the statute. PEBA fails to consider the plain language of the entire statute, as a whole, and thus misapprehends its meaning.

S.C. Code Ann. § 9-20-40(b) provides, in relevant part, "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 just what it sounds like— participation and enrollment in the State ORP.[1] Similarly, "anniversary" means the date upon which participation and enrollment have continued in effect for one year, just as a wedding anniversary indicates that a couple remained married, and a work anniversary indicates that an individual remained employed. PEBA's proposed interpretation, which requires a person to make the SCRS election less than five calendar years from the date of election whether he is participating in the State ORP or not, ignores both the common use and meaning of the word "anniversary" in normal parlance, as well as the first four words of the statute, which indicate that the subject of the subsection is "A State ORP participant…" § 9-20-40(b).

[1] S.C. Code Ann. § 9-20-10(3) defines "participant" as "an eligible employee who participates in the optional retirement program provided by this chapter."

Notably, the statutory language sets the deadline according to the "anniversary of the person's initial enrollment" and not the anniversary of the *date* of initial enrollment. PEBA correctly notes in its brief that the "*date* of initial enrollment" for predecessor plans to the State ORP is defined in S.C. Code Ann. § 9-20-40(b) as "the date of initial enrollment in these programs." The date of initial enrollment is relevant in determining the beginning of the one- to five-year period in which election to SCRS is allowed. However, having defined the "date of initial enrollment," in the very same paragraph, the Generally Assembly specifically chose not to include the word "date" in the provision which establishes the SCRS election timeline, instead connecting it to the "anniversary of the person's initial *enrollment* in the State ORP." S.C. Code Ann. § 9-20-40(b) (emphasis added). Thus, the deadline to make the SCRS election is dependent on the period of "enrollment" – that is, the state of being enrolled—and not the date of enrollment.[2]

Applying this correct interpretation to Appellant's situation, Appellant has timely elected to join SCRS, as his election was made following his first year, but before his fifth year of initial enrollment and participation in the State ORP.

II. PEBA's proposed interpretation of S.C. Code § 9-20-40 wrongly diminishes, and, in some cases, denies State ORP participants' access to SCRS.

Appellant's proposed interpretation of S.C. Code Ann. § 9-20-40 is also the only proposed construction which fairly benefits State employees, while PEBA's proposed interpretation unnecessarily and unreasonably hinders access to participation in the SCRS, in violation of the South Carolina Supreme Court's directives as to how such statutes must be construed.

[2] The phrase "initial enrollment" indicates that the one- to five-year window begins when the individual first elects to join the State ORP, and does not start over with subsequent enrollments. In other words, the election to join SCRS may only be made when the person has participated in the State ORP between one and five years, over the course of the individual's lifetime.

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

It is clear from the language of S.C. Code Ann. § 9-20-40(B), that the Legislature intended to provide State ORP participants five years to actually participate in the program, observe and assess the quality of the program, as well as track the growth of their investments in comparison to the SCRS pension.

This five-year window also allows the State ORP participant an opportunity to evaluate state employment as a whole, which is critical because, while the SCRS pension may be more advantageous in the long-term, it requires an employee to remain employed with the state for a significant period of his working years. By comparison, funds accumulated in an account under the State ORP, which is a defined contribution program, have a possibility of greater short-term growth, and can usually be rolled into an Individual Retirement Account or a 401(k) provided by private employer.

Thus, an individual (such as, in Appellant's situation, an attorney) may choose the more flexible option, the State ORP, until he has had up to five years of state employment in order to determine whether the salary, benefits, and lifestyle of state employment are preferable to that of private practice.

PEBA's proposed interpretation inappropriately denies this full five-year window of participation for State ORP participants with breaks in service, and thus diminishes their access to join SCRS in contradiction of the plain language of S.C. Code Ann. § 9-20-40.

In an effort to minimize the obvious harmful effect of its reading of the statute, PEBA, citing Section 9-20-40(A), makes the curious and surprising assertion that "an eligible employee who is entering or re-entering covered employment always has the ability to make a plan election upon hire." Resp. Brief at 16.[3]

There is nothing in Section 9-20-40(A) which suggests that an individual who has elected to join the State ORP could circumvent the one- to five-year window articulated in subparagraph (B) by simply leaving and re-entering covered employment. In fact, the statute explicitly states otherwise: "The election to participate in the State ORP is irrevocable except as set forth in subsections (B) and (C)."[4] Thus, Subsection (B), which is the subject of this appeal, contains the sole exception to that irrevocable State ORP election, whether entering or re-entering service, and therefore constituted the sole avenue for Appellant to elect to join the SCRS when he did. PEBA's assertion to the contrary reveals that its reading of Section 9-20-40 simply does not comport with the plain language and meaning of the statute, as a whole.

Based on these considerations, the interpretation advanced by Appellant is the only reading of S.C. Code Ann. § 9-20-40(B) which comports with the statute, and which fairly favors "those to be benefitted and the objective sought to be accomplished," while PEBA's construction of the statute hinders State ORP participants' access to SCRS in a way that was not intended by the legislature. Stuckey, 339 S.C. at 401, 529 S.E.2d at 708.

III. PEBA's published guidance, including the parenthetical discussed in its brief, supports Appellant's interpretation of Section 9-20-40(b).

[3] Even assuming this assertion is accurate, the fact remains that some State ORP participants, such as judicial law clerks returning to state employment after five years, will re-enter covered employment and be faced with a choice of State ORP or SCRS without the benefit of five years of participation prior to making a "final decision" on which retirement system to which they will be forever bound.

[4] Moreover, a person who initially elects to join the SCRS can *never* join the State ORP.

To the extent that this Court finds that S.C. Code Ann. § 9-20-40(B) is ambiguous as applied to the present situation, PEBA's own guidance supports Appellant's position:

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

(R. p. 47) (Appellant Summary Judgment Affidavit ¶ 6) citing "State ORP Annual Open Enrollment," Feb. 24, 2020, peba.sc.gov/sorpopenenrollment (emphasis added).

To contradict the clear provisions of its own guidance, PEBA suggests that the parenthetical sentence fragment "(i.e., initial enrollment between January 1, 2015 and March 1, 2019)" supports its contention that the deadline to elect to join the State ORP is dependent on the date of initial election, regardless of whether the individual was participating in the State ORP since that time. PEBA explains that its guidance "inartfully" (albeit clearly) states the rule, while the *real* rule is articulated in parenthesis, via vague, incomplete sentence.

A more reasonable and likely reading of the parenthetical, however, is that it refers specifically and only to those individuals who have been continuously participating and enrolled in the State ORP between January 1, 2015 and March 1, 2019, since the vast majority of individuals seeking information regarding the open enrollment period are likely to be state employees in their initial period of continuous enrollment, who have not had a break in service. In that case, the parenthetical would be consistent with the paragraph it seeks to clarify, and would comport with the language of S.C. Code Ann. § 9-20-40(B). However, that is obviously not the situation for every state employee, some of whom, like Appellant, have left and returned to state employment. In that case, the "i.e." simply has no application to those individuals.

Notably, the parenthetical makes no account for the exception that PEBA notes in its brief, whereby "an eligible employee who is entering or re-entering covered employment always has the

ability to make a plan election upon hire." Resp. Brief at 16. If this exception to the rule exists as PEBA contends, the parenthetical in its guidance is incorrect when applied to a person who was not continuously enrolled in the State ORP, further supporting the fact that it must be read as applying only to those who had been continuously participating and enrolled in the State ORP between January 1, 2015 and March 1, 2019.

In the present case, it is undisputed that Appellant, at the time of open enrollment, had "at least 12 months, but no more than 60 months, of participation from their initial enrollment." As such, Appellant's election to join SCRS was timely made, and this fact is reflected in, and not diminished by, PEBA's published guidance.

IV. The ALC cases cited by PEBA have no bearing on this case, and their outcomes would have been the same if Appellant's proposed construction of the statute had been applied.

The Administrative Law Court cases PEBA cites in its brief bear no relevance to the facts of this case, or the application of S.C. Code Ann. § 9-20-40 in dispute. In fact, even if Appellant's interpretation had been applied in each of those cases, their outcomes would have been exactly the same:

> •In Dessau v. S.C. Pub. Employee Benefit Auth., the petitioner participated in the State ORP for twenty-four years prior to seeking to join SCRS. 2019 WL 6998820, at *1 (Dec. 2, 2019).
>
> •In Shehu v. S.C. Pub. Employee Benefit Auth., the petitioner had participated in the State ORP for twelve years, followed by a break in service, and subsequently re-joined the State ORP for another year prior to seeking to join SCRS. 2019 WL 4391702, at *1 (Sept. 9, 2019).
>
> •In Senn v. S.C. Budget & Control Bd., the petitioner had participated in the State ORP for approximately eighteen years, including his time enrolled in the Higher Education ORP, prior to seeking to join SCRS. Docket No. 10-ALC-30-0946-CC.

None of these cases support PEBA's contentions or contradict Appellant's position in the present matter. They do not represent any consistent position on PEBA's behalf in relation to this case

because the facts and contentions in this case are critically and fundamentally different. At most, PEBA's citation of cases that are only tangentially related to the present matter suggests that Appellant's specific situation is not so common that allowing Appellant's election into SCRS would undermine PEBA's operations.

In any event, none of these cases were appealed and decided beyond the Administrative Law Court; therefore, this Court is not bound by their conclusions.

CONCLUSION

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

Respectfully submitted,

By: s/ Shawn D. Eubanks
Shawn D. Eubanks (S.C. Bar No. 78370)

1200 Senate St., Suite 214
Columbia, SC 29201
Telephone: 803-734-2623
Facsimile: 803-734-2690

shawn.eubanks@sto.sc.gov

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CERTIFICATE OF SERVICE

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

Justin R. Werner, Esq.
South Carolina Public Employee Benefit Authority
202 Arbor Lake Drive
Columbia, SC 29223
(803) 737-6894
jwerner@peba.sc.gov

Respectfully submitted,

By: s/ Shawn D. Eubanks
Shawn D. Eubanks (S.C. Bar No. 78370)

1200 Senate St., Suite 214
Columbia, SC 29201
Telephone: 803-734-2623
Facsimile: 803-734-2690

shawn.eubanks@sto.sc.gov

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