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.

PETITION FOR REHEARING

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INTRODUCTION AND PROCEDURAL HISTORY

This matter arose from a decision by the South Carolina Public Employee Benefit Authority ("PEBA") to deny Appellant Shawn D. Eubanks ("Appellant") enrollment into the South Carolina Retirement System ("SCRS"). The South Carolina Administrative Law Court ("ALC") affirmed PEBA's decision on November 5, 2020. This Court affirmed the ALC's decision in its decision, filed March 23, 2022. The Court held in that decision that PEBA properly denied Appellant's eligibility to join the SCRS, in accordance with S.C. Code Ann. § 9-20-40(B), which provides "A State ORP participant may… [join SCRS] after the first annual anniversary but before the fifth annual anniversary of the person's initial enrollment in the State ORP." The Court upheld PEBA's denial of Appellant's election to join SCRS, considering only that he first elected to join the State Optional Retirement Plan ("State ORP") as a law clerk in 2009, and declining to take into account the fact that Appellant had two breaks in service (and State ORP participation) since his initial enrollment, and had participated in the State ORP for less than five years when he elected to join the SCRS during an open enrollment at his current position with the State Treasurer's Office.

ARGUMENT

Pursuant to Rule 221, SCACR, Appellant respectfully petitions this Court for rehearing regarding Appellant's eligibility to join SCRS, on the grounds that the Court fails to acknowledge that PEBA's own contradictory interpretation of S.C. Code Ann. § 9-20-40, as applied to Appellant, proves that the statute is ambiguous and therefore must 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). The relevant part of the statute provides as follows:

> (A) All eligible employees shall elect either to join the South Carolina Retirement System or to participate in the State ORP under this chapter within thirty days after entry into service. […] The election to participate in the State ORP is irrevocable except as set forth in subsections (B) and (C).
>
> (B) A State ORP participant may irrevocably elect to join the South Carolina Retirement System during any open enrollment period after the first annual anniversary but before the fifth annual anniversary of the person's initial enrollment in the State ORP…

The Court's decision indicates that Section 9-20-40 is unambiguous as to the question of how a break in service is to be treated in determining a covered employee's eligibility for joining the SCRS after he first elects to join the State ORP, finding, in summary, that breaks in service have no effect, and that the "five-year rule" is unaffected by an employee's leaving and re-entering covered employment.

The problem with this finding is that PEBA admits that it reads exceptions into the "five-year rule" of Section 9-20-40 based on breaks in service, contradicting its position as to Appellant, and proving the ambiguity of the statute.

PEBA, citing Section 9-20-40(A), asserts that an employee with a break in service can join SCRS at the moment of re-hiring, regardless of the five-year rule set forth in Subsection (B). Resp. Brief at 16, ("[A]n eligible employee who is entering or re-entering covered employment always has the ability to make a plan election upon hire.") However, if the five-year rule of Subsection (B) is to be applied without regard to breaks in service, as the Court's decision suggests, PEBA's assertion rehires *directly contradicts* the statutory language: "The election to participate in the State ORP is irrevocable except as set forth in subsection (B)…" *Id.*

It is a wholly inconsistent application of the five-year rule of Section 9-20-40(B) to bar employees from election to join SCRS during open enrollment without crediting them for their breaks in service (i.e. periods during which they were not "State ORP participants" per the statute),

while simultaneously allowing all employees returning from a break in service to join SCRS at the moment of re-hiring, regardless of the "annual anniversary of the person's initial enrollment," and regardless of the supposed irrevocability of their State ORP election on that date.

Assuming, as Appellant does, that PEBA's contradicting applications of Section 9-20-40 represent a good faith attempt to apply the intent of the General Assembly, these inconsistent positions prove the ambiguity of the statutory language: Section 9-20-40 offers no clear explanation for how the five-year rule of SCRS eligibility is to be applied when the employee has had a break in service.

To justify PEBA's assertion that employees re-entering covered employment are always eligible for enrollment into SCRS, a reader must infer that a break in service is a meaningful event, the effect of which is not clearly or sufficiently contemplated by the plain language of Section 9-20-40, and, therefore, certain logical caveats must be read into the statute. PEBA, apparently, is inclined to offer such caveats to benefit employees upon re-entry, but not to employees like Appellant who make the SCRS election during an open enrollment period. This distinction is arbitrary, and if Section 9-20-40 allows it, this Court must find the statute ambiguous as applied to Appellant's case.

Where a statute does not "directly speak to the issue" in dispute, this Court must not enable PEBA to pick and choose when an employee's break in service is taken into account for purposes of SCRS eligibility.[1] Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 32, 766 S.E.2d 707, 715 (2014). To the contrary, the South Carolina Supreme Court has held

[1]It is not clear that PEBA has consistently applied the interpretation it imposes upon Appellant to deny his enrollment in SCRS, since none of the Administrative Law Court cases it cites involve an employee with less than five years of State ORP participation, rendering a break in service irrelevant to the outcome of those cases.

that PEBA is obligated to interpret an ambiguous statute in favor of Appellant. See Stuckey v. State Budget & Control Bd., 339 S.C. 397,401, 529 S.E.2d 706, 708 (2000), ("[R]etirement statutes should be liberally construed in favor of those to be benefitted and the objective sought to be accomplished.").

It bears noting that the 2001 version of the S.C. Code, Section 9-20-40 contained substantially different language on the topic of State ORP participants' SCRS eligibility:

> …an eligible employee who participates in the State ORP may irrevocably elect to join the South Carolina Retirement System during the fifth calendar year after initial enrollment in the State ORP... The optional retirement participant must make this election to participate in the South Carolina Retirement System during the months of January, February, or March of the fifth calendar year after the employee's initial enrollment in the State ORP, or failing to make the election within the allotted time, the employee is considered to have irrevocably elected to participate in the State ORP.

Based on that language, an ORP participant could elect to join SCRS only if he was an eligible employee during open enrollment of the "fifth calendar year" following his State ORP enrollment. Under this former language, PEBA's denial of Appellant's election to join SCRS may have been justified; however, the current version of the law eschews the term "calendar year" in favor of "anniversary," indicating that the calculation of time is to be tied to participation rather than calendar days. By making these changes, the General Assembly intended to clarify that the opportunity to elect to join SCRS is stayed by a break in service (during which the individual does not accrue "anniversaries" of State ORP participation) for purposes of the five-year rule, instead tying the clock to actual participation in the State ORP, as Appellant contends.

In affirming PEBA's inconsistent applications of Section 9-20-40, this Court's decision 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. If it is not clear, then it

ought to be inferred from the language of S.C. Code Ann. § 9-20-40(B), that State ORP participants are provided five years of actual participation in the program in order to make their SCRS election, rather than locking out law clerks, interns, and other professionals who, early in their career, may not have anticipated long-term employment with the State of South Carolina, opting for the State ORP.

As applied to the present case, it is undisputed that Appellant has less than five years of participation in the State ORP; thus, he is entitled to enrollment in SCRS. In reaching this outcome, the entirety of Section 9-20-40 can and must be applied with fidelity, consistency, and fairness—something that PEBA's self-contradicting interpretation does not achieve.

Accordingly, Appellant respectfully requests this Court to rehear and reconsider its decision, filed March 23, 2022, and hold that Appellant's election to join the SCRS was timely, and that he must be allowed to enroll in the SCRS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that today undersigned counsel served one (1) copy of the PETITION FOR REHEARING by electronic mail delivery of same to the recipients listed, and at their Attorney Information System provided email addresses below:

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