



ALAN WILSON
ATTORNEY GENERAL

May 14, 2013

Darry Oliver, Chief Operating Officer
S.C. Retirement System Investment Commission
1201 Main Street, Suite 1510
Columbia, South Carolina 29201

Dear Mr. Oliver:

Attorney General Alan Wilson has referred your letter of April 25, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issues:

- 1) Does an individual have to be a resident of South Carolina to be qualified for appointment to the position of Retiree Representative Member with the S.C. Retirement Investment Commission?
- 2) Would an individual qualify for appointment to the Retiree Representative Member position with the S.C. Retirement Investment Commission if he participates in and receives benefits from the State Optional Retirement Program?

Short Answers:

- 1) Yes, it is likely a court would determine in order to serve as a Retiree Representative Member with the S.C. Retirement Investment Commission, one would have to be a resident of South Carolina.
- 2) No, a participant in and receiver of benefits from the State Optional Retirement Program would not be eligible as a nominee to serve as a Retiree Representative Member with the S.C. Retirement Investment Commission unless he separately qualifies as a retired member in the S.C. Retirement System.

Law/Analysis:

As you state in your letter:

[s]tate law provides that one of the seven members of the South Carolina Retirement system ("Commission") must be "a retired member of the retirement system" (hereafter, the "retiree Representative Member"), who meets the qualification requirements set forth in State law, including S.C. Code Ann. Section 9-16-315(E), and must be "appointed by unanimous vote of the voting member" of the Commission. See S.C. Code Section 9-16-315(A)(6). As a result of amendments made to the law in 2012, the Retiree Representative Member is a voting member of the Commission and is paid the same salary as the four other non-ex officio members of the Commission. (See 2012 Act No. 278, Part IV, Subpart 3, §64.A).

South Carolina Code Section 9-16-315 says:

(A) There is established the "Retirement System Investment Commission" (RSIC) consisting of seven members as follows:

...

(6) one member who is a retired member of the retirement system. This representative member must be appointed by unanimous vote of the voting members of the commission; and

...

(E) A person may not be appointed to the commission unless the person possesses **at least one of the following qualifications:**

(1) the Chartered Financial Analyst credential of the CFA Institute;

(2) the Certified Financial Planner credential of the Certified Financial Planner Board of Standards;

(3) reserved;

(4) at least twenty years professional actuarial experience, including at least ten as an Enrolled Actuary licensed by a Joint Board of the Department of the Treasury and the Department of Labor, to perform a variety of actuarial tasks required of pension plans in the United States by the Employee Retirement Income Security Act of 1974;

(5) at least twenty years professional teaching experience in economics or finance, ten of which must have occurred at a doctorate-granting university, master's granting college or university, or a baccalaureate college as classified by the Carnegie Foundation;

(6) an earned Ph.D. in economics or finance from a doctorate-granting institution as classified by the Carnegie Foundation; or

(7) the Certified Internal Auditor credential of The Institute of Internal Auditors.

(F) Not including the State Treasurer, no person may be appointed or continue to serve who is an elected or appointed officer or employee of the State or any of its political subdivisions, including school districts.

....

(H)(2)...Notwithstanding any other provision of law, **membership on the commission does not make a member eligible to participate in a retirement system** administered pursuant to this title and does not make a member eligible to participate in the employee insurance program administered pursuant to Article 5, Chapter 11, Title 1....

S.C. Code § 9-16-315 (emphasis added).

1) As quoted from your letter,

A potential nominee for the Retiree Representative Member recently moved his residence from South Carolina to a neighboring state. Although we are not aware of any statutory residency requirement relating to service as a Retiree Representative Member, we are mindful that the State Constitution contains several provisions which address the topic of "offices", as well as the qualifications for service as an officer. See, e.g., S.C. Const., Article XVII, Section 1, Article XVII, Section 1A and Article VI, Section 1. We would appreciate your Office's guidance as to whether there is any

Mr. Oliver
Page 3
May 14, 2013

constitutional or statutory limitation relating to the Retiree Representative Member's state of residency.

This Office previously opined that a court in South Carolina would likely find a Retiree Representative Member would be an office in South Carolina for purposes of the dual office holding prohibition in the South Carolina Constitution. Op. S.C. Atty. Gen., 2012 WL 4836948 (October 3, 2012). Therefore, it is subject to the requirement by the South Carolina Constitution for a public officer to have the qualifications of an elector. S.C. Const. Art. VI, § 1. The South Carolina Constitution specifies:

“No person may be popularly elected to and serve in any office in this State or its political subdivisions unless he possesses the qualifications of an elector, is not disqualified by age as prescribed in this Constitution, and has not been convicted of a felony under state or federal law or convicted of tampering with a voting machine, fraudulent registration or voting, bribery at elections, procuring or offering to procure votes by bribery, voting more than once at elections, impersonating a voter, or swearing falsely at elections/taking oath in another's name, or has not pled guilty or nolo contendere to these offenses. However, notwithstanding any other provision of this Constitution, this prohibition does not apply to a person who has been pardoned under state or federal law or to a person who files for public office fifteen years or more after the completion date of service of the sentence, including probation and parole time, nor shall any person, serving in office prior to the ratification of this provision, be required to vacate the office to which he is elected. No person may be elected or appointed to office in this State for life or during good behavior, but the terms of all officers must be for some specified period except officers in the militia.”

S.C. Const. Art. VI, § 1 (emphasis added). The South Carolina Constitution further details requirements for elected officials and officeholders by stating:

No person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector....

S.C. Const. Art. XVII, § 1. The qualifications of an elector were addressed in a previous opinion by this Office. This Office opined:

The phrase “qualified elector” means “registered elector” and no one who has not been registered to vote (and has thus met the requirements to be a qualified elector) can hold a public office, elected or appointed. Mew v. Charleston & Savannah Ry. Co., 55 S.C. 90, 32 S.E. 828 (1899); Blalock v. Johnston, 180 S.C. 40 185 S.E. 51 (1936). Article II, Section 4 of the state Constitution provides in relevant part that “[e]very citizen of the United States and of this State of the age of eighteen and upwards who is properly registered shall be entitled to vote in the precinct of his residence and not elsewhere.” Qualifications to be met to be a registered elector are found in S.C. Ann. § 7-5-120....

Op. S.C. Atty. Gen., 2008 WL 903972 (March 31, 2008). South Carolina Code § 7-5-120 (1976 Code, as amended) says:

- (A) Every citizen of this State and the United States who applies for registration must be registered if he meets the following qualifications:
- (1) meets the age qualification as provided in Section 4, Article II of the Constitution of this State;
 - (2) is not laboring under disabilities named in the Constitution of 1895 of this State; and
 - (3) is a resident in the county and in the polling precinct in which the elector offers to vote.
- (B) A person is disqualified from being registered or voting if he:
- (1) is mentally incompetent as adjudicated by a court of competent jurisdiction;
 - or
 - (2) is serving a term of imprisonment resulting from a conviction of a crime; or
 - (3) is convicted of a felony or offenses against the election laws, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.

S.C. Code § 7-5-120 (emphasis added).

The law in South Carolina is clear that a person's residence is his domicile, a person may only have one domicile and that domicile is where a person has the intention of returning whenever he is gone. S.C. Code § 7-1-25 (A). The law also authorizes a spouse to have a separate domicile for voting purposes. S.C. Code § 7-1-25 (B). There are eleven factors to consider someone's intent in order to ascertain their domicile for voting purposes. S.C. Code § 7-1-25 (D). However, if it is clear that the nominee is not a resident of South Carolina and therefore not a qualified elector, it appears the South Carolina Constitution would prevent them from holding an office in South Carolina. Therefore, they would not be eligible to serve as a Retiree Representative Member on the S.C. Retirement Investment Commission.¹

2) In regards to the second issue, you state in your letter:

[b]y way of background, the State ORP [Optional Retirement Plan] is a defined contribution plan, variants of which have been available to certain employees since 1987. A mandatory employer contribution is made to an account belonging to the ORP participant. There is also a mandatory employee contribution [pursuant to S.C. Code Sections 9-20-10 and 9-20-40].

Section 9-16-315(A)(6) notes that the Retiree Representative Member must be a "retired member of the retirement system." The term "retirement system" is a defined term:

¹ Please note pursuant to South Carolina Code Section 9-16-315(H)(2) each commission member (other than the Executive Director of the Employee Benefit Authority) is entitled to a salary and mileage. Therefore, even if the Retiree Representative Member were authorized to hold the office while residing out of South Carolina, mileage would still likely be upheld under the statute but will impose an increased burden of cost the further the Representative resides from South Carolina.

Mr. Oliver
Page 5
May 14, 2013

“Retirement system” means the South Carolina Retirement System, Retirement System for Judges and Solicitors, Retirement System for Members of the General Assembly, National Guard Retirement System, and Police Officers Retirement System established pursuant to Chapters 1,8,9,10 and 11 of this title.

S.C. Code Ann. Section 9-16-10(8). The State ORP is established pursuant to Chapter 20 of Title 9 and is administered by the South Carolina Retirement System. See S.C. Code Ann. Sections 9-20-20 and 9-20-30. Since at least 2001, the ORP has been available only to those individuals who were eligible for membership in the South Carolina Retirement System. Id. at Section 9-20-20.

Beginning with a simple reading of the statute, election alone to the Retiree Representative Member position with the South Carolina Retirement Investment Commission would not make the member eligible as a retired member of the South Carolina Retirement System. S.C. Code § 9-16-315(H)(2). Therefore, the Retiree Representative Member must already be qualified as a retired member of the retirement system before accepting the position. S.C. Code § 9-16-315(A)(6). Eligibility to participate in the State Optional Retirement Program is determined by the South Carolina Retirement System pursuant to South Carolina Code § 9-20-20.

Therefore, let us look further to the statutes concerning the Optional Retirement Program. As a background on statutory interpretation, the cardinal rule in statutory interpretation is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute’s interpretation must be “practical, reasonable, and fair” and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a “sensible construction,” and a “literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose.” U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)).

A participant in the State Optional Retirement Program may elect to participant in the South Carolina Retirement System pursuant to S.C. Code § 9-20-40. Based on a plain reading of that statute, it would necessarily imply that participation in the State Optional Retirement Program does not mean one is automatically a member of the South Carolina Retirement System, only that qualification to be in the State Optional Retirement Program is the same as for the South Carolina Retirement System. S.C. Code § 9-20-20. Additionally, supporting that interpretation, as you stated in your letter, South Carolina Code Section 9-16-315(A)(6) requires that the Retiree Representative Member must be a “retired member of the retirement system.” The term “retirement system” is a defined term in Title 9, Chapter 16 of the South Carolina Code of Laws. “‘Retirement system’ means the South Carolina Retirement System, Retirement System for Judges and Solicitors, Retirement System for Members of the General Assembly, National Guard Retirement System, and Police Officers Retirement System established pursuant to

Mr. Oliver
Page 6
May 14, 2013

Chapters 1,8,9,10 and 11 of this title.” S.C. Code § 9-16-10(8). Since the Optional Retirement Program is found in Chapter 20 of Title 9 and is not listed in the definition of “retirement system” pursuant to S.C. Code § 9-16-10(8), it follows that the Optional Retirement Program is not part of the “retirement system” for purposes of the requirements of a Retiree Representative Member found in S.C. Code § 9-16-315(A)(6). Therefore, based on this Office’s research, it is our understanding a nominee for the position of Retiree Representative Member on the S.C. Retirement Investment Commission must separately qualify as a member of the South Carolina Retirement System because participation alone in the State Optional Retirement Program would not be sufficient.

Conclusion: Based on the above conclusions, it appears that both nominees would not likely qualify under the facts as given. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General