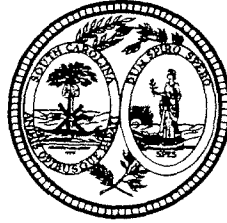


7922 Letting



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

June 20, 2005

The Honorable Inez M. Tenenbaum
State Superintendent of Education
1429 Senate Street
Columbia, South Carolina 29201

Dear Superintendent Tenenbaum:

This opinion follows in response to a letter dated February 4, 2005. We have delayed our response in light of the pendency of major legislative changes which might affect our opinion. As will be seen below, such legislation has now been enacted.

In your letter, you inquired as to whether a school district which has rehired a retired teacher pursuant to S.C. Code Ann. § 9-1-1790 must employ that individual as a continuing contract teacher or whether the district may offer that teacher a memorandum or letter of agreement to teach for one year. We assume for purposes herein that the teacher's retirement decision is completely voluntary. Upon review of this inquiry, we conclude that, based upon the relevant statutory language and other legal authorities, voluntarily retired teachers who have been hired pursuant to Section 9-1-1790, may be offered contracts negotiated by the parties, as opposed to continuing contracts.

Law / Analysis

We begin by examining the pertinent statutory language to determine whether the General Assembly intended that voluntarily retired teachers who have returned to work must be employed as continuing contract teachers. The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan, supra*. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.* When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning. *Id.* In interpreting a statute, the word and its meaning in conjunction with the purpose of

Respectfully,
Henry McMaster

the whole statute and the policy of the law should be considered. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson, supra*.

When a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct.App.1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Id.* Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. *Id.*; *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894 (Ct.App.1998).

Only recently, at the close of the 2005 legislative session, the General Assembly enacted R 200, entitled the "State Retirement System Preservation and Investment Reform Act." This Act overhauled many of the existing laws relative to State Retirement System including the so-called TERI program. (Teacher and Employee Retention Incentive Program). The purpose of the Act, as we understand it, was to provide for further financial soundness of the State Retirement System.

In pertinent part, S.C. Code Ann. § 9-1-1790 formerly read as follows:

A retired member of the system who has been retired for at least sixty days may return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system.

As amended by R200, § 9-1-1790 (A) now provides:

- (A) A retired member of the system who has been retired for at least fifteen consecutive calendar days *may be hired and return to employment covered by this system* or any other system provided in this title without affecting the monthly retirement allowance he is receiving from the system. *If the employment continues for at least forty-eight consecutive months*, the provisions of Section 9-1-1590 apply. If a retired member of the system returns to employment covered by this system or any other system provided in this title sooner than fifteen days after retirement, the member's retirement allowance is suspended while the member remains employed by the participating employer. If an employer fails to notify the system of the engagement of a retired member to perform services, the employer shall reimburse the system for all benefits wrongly paid to the retired member.

(emphasis added).

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For those individuals currently employed as teachers, South Carolina law provides special employment rights which are guaranteed by the General Assembly once they have successfully completed an induction or annual contract. The aforementioned employment contract is known as a "continuing contract" and is described in S.C. Code Ann. § 59-26-40 (J). See, *Op. S.C. Atty. Gen.* (October 29, 1984) [§ 59-26-40 sets up a three-tiered system of teacher contracts; he or she receives a continuing contract after successful completion of a provisional year and an annual contract]. Section 59-26-40 (J) reads:

After successfully completing an induction contract year and an annual contract period, a teacher shall become eligible for employment at the continuing contract level. This contract status is transferable to any district in this State. Continuing contract teachers shall have full procedural rights that currently exist under law relating to employment and dismissal. Teachers employed under continuing contracts must be evaluated on a continuous basis. At the discretion of the local district and based on an individual teacher's needs and past performance, the evaluation may be formal or informal. Formal evaluations must be conducted with a process developed or adopted by the local district in accordance with State Board of Education regulations. The formal process also must include an individualized professional growth plan established by the school or district. Professional growth plans must be supportive of district strategic plans and school renewal plans. Informal evaluations which should be conducted for accomplished teachers who have consistently performed at levels required by state standards, must be conducted with a goals-based process in accordance with State Board of Education regulations. The professional development goals must be established by the teacher in consultation with a building administrator and must be supportive of district strategic plans and school renewal plans.

The question which you have raised is the status of a teacher who has voluntarily retired from service and the employer decides to re-employ. As amended by R200, the General Assembly has stated that a retired member of the system "may be hired and returned to employment covered by this system" without "affecting the monthly retirement allowance he is receiving from the system." In other words, in addition to reducing the required time for retirement from 60 days to 15 days, the \$50,000 compensation limit, which previously existed as part of § 9-1-1790, has now been removed. Moreover, the General Assembly has inserted the phrase "may be hired" to precede the words "may return to employment."

This latter change is significant in terms of your question, in our view. The term "hire" generally means "[a] contract by which one person grants to another either the enjoyment of a thing or the use of the labor or industry, either of himself or his servant during a certain time, for a stipulated compensation" *Black's Law Dictionary* (Rev. 4th ed.) In other words, by adding the word "hire" in conjunction with the word "may" (which is discretionary), it appears that the General

Assembly sought to insure that those post-retirement employees which an agency (such as a school district) sought to have "return to work" were those which that agency chooses and negotiates with a new contract. Any other reading of the statute as amended by the 2005 Act would, in essence, disregard the Legislature's use of the term "hire."

Thus, the "continuing contract" authorization must be read in light of the significant changes recently made to § 9-1-1790, as discussed above. The purpose of the "continuing contract" is obviously to insure job security for teachers. Chapter 26 of Title 59, particularly § 59-26-40(J) was intended to provide those who meet the requisite qualifications and requirements and who enter the public school system with the intention of becoming career teachers with the necessary employment security of the profession. However, *upon retirement*, it is apparent to us, particularly in light of the new language of § 9-1-1790, that retirement by a teacher or other state employee brings about a clear change in status. Voluntary retirement, in essence, severs the previous employment relationship and a new contractual relationship is formed by the person's "return to work." The employer is given broad discretion with respect to which employees to "hire" for "return to employment" and for how long. The compensation becomes negotiable with the removal of the \$50,000 cap. The clear thrust of the new law is that the employer possesses the legal flexibility to "hire" an individual who has retired and pay that person an appropriate, agreed upon compensation in addition to the retirement benefits which that individual is drawing. Rather than a "continuing contract" which the individual received as a regular teacher, the parties are authorized by § 9-1-1790 to enter into an entirely new agreement, based upon needs, the individual's particular skills, etc.

Courts in other jurisdictions have likewise concluded that a teacher who is rehired immediately after voluntary retirement no longer possesses continuing contract status. For example, in *Thomas v. Ind. School Dist. No. 2142*, 639 N.W.2d 619 (2002), the Minnesota Court of Appeals stated the following:

[r]elator contends, however, that the legislature required that rehired teachers be rehired only with continuing contract status. We disagree. The relevant statutes do not support this construction. First, although section 354.44 subdivision 5, refers to retired teachers' continuing payment rights, it says nothing about continuing contract rights. Courts cannot add to a statute "what the legislature purposely omits or inadvertently overlooks." *Ullom v. Ind. Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994) (citation and internal quotation omitted). Therefore, we cannot add to section 354.44, subdivision 5, a provision that a retired teacher who resumes teaching has a continuing contract right.

Moreover, such a requirement would deter, if not preclude, school districts from rehiring their retired teachers. Even if retired teachers "started over" at the bottom of the seniority list, they would still be superior to probationary teachers, who are not yet on the list and who would have a reduced chance of becoming listed.

School districts would find it more difficult to recruit new teachers, a difficulty that could outweigh the benefits of hiring retired teachers.

639 N.W.2d at 620.

Similarly, in *Wirt v. Parker School Dist. # 60-4*, 689 N.W.2d 901 (2004), the Supreme Court of South Dakota held that a former teacher who retired after 39 years of teaching, waived her continuing contract status when she voluntarily retired. The Court found that there "is a break in service upon resignation." Further, "after seeking new employment with the school district after retirement, 'she accepted a new contract that contained terms applicable to non-continuing contract teachers.'" Moreover, according to the Court,

... there is nothing in the statutes or case law indicating that the purpose of the continuing contract law is to enable teachers to retain their status *indefinitely*, even after a voluntary resignation and termination of the employment relationship. On the contrary, "if school districts could not hire retired teachers without thereby immediately returning them to continuing contract status, 'retirement' would be illusory: 'retired' teachers would be able to bump less-senior 'permanent' teachers." *Thomas v. Independent School Dist. No. 2142*, 639 N.W.2d 619, 622 (Minn.Ct.App.2002).

The same reasoning employed by these cases appears applicable here. Nothing contained in § 59-26-40(J) or related provisions speaks to the maintenance of a continuing contract after a teacher voluntarily retires. Indeed, the continuing contract statute speaks to "employment," thereby assuming the teacher remains employed. Section 9-1-1790, however, requires a "break" in service before the retired individual may return to work. Thus absent express statutory authorization by the General Assembly that "continuing contracts" extend beyond a teacher's voluntary retirement, we cannot imply the existence of such authorization, particularly in light of the recent amendments to § 9-1-1790 which leaves it to the employer as to whether to "hire" a retired employee and permit such employee to return to work.

This construction of § 9-1-1790, as recently amended, is consistent with an opinion which this Office issued, dated June 6, 2002. There, even prior to the recent amendments to § 9-1-1790, we advised that retirees who return to work no longer possess the same rights and privileges possessed prior to retirement. Specifically, we concluded that a retired officer of the Forestry Commission no longer possessed the same law enforcement authority he had prior to retirement. In our view, "[r]etirement would qualify as a separation of employment, resulting in the return or lapse of the law enforcement officer's certification." While, we reasoned, a specific statute "allowed a law enforcement officer to retain his or her commission, it does not allow the officer to retain his or her authority" to enforce the laws" as if he or she remained a certified law enforcement officer." As a retiree who had been contracted with by the agency to return to work, we concluded that the

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officer did not "retain his employment." Thus, consistent with the cases in other jurisdictions, as well as the reasoning referenced above, we conclude that voluntarily retired teachers do not retain continuing contract status.

Our conclusion herein that § 59-26-40(J) is inapplicable to voluntarily retired teachers and that § 9-1-1790, as amended, is controlling with respect to those teachers who are "hired" by a school district upon retirement, is an article written recently by an attorney specializing in employment law in South Carolina.

David Duff, a legal practitioner, has argued that a "rehired employee has no right to continued employment" and furthermore that:

School districts wishing to rehire a past TERI participant or other retiree for an upcoming school year should not make an employment offer unless, after following its normal recruitment and selection process, there is no other non-retired candidate available for the position. School district records must show that, on May 31 of a given year, no qualified, *non-retired* member of the Retirement System was available for the job. If that condition is met, the district may offer the retiree employment after June 1. Like those rehired during the school year, retirees who are rehired for a full school year should be offered a Letter of Agreement stating that the employee will have no right to employment beyond that particular school year. Retirees who are not participating in TERI may earn up to \$50,000 during the "fiscal year," which runs from July 1 through June 30. However, the South Carolina Department of Education may approve a higher salary limit for retirees who are assigned to a "critical needs" area.

Coping with the TERI Transition, David Duff, November 2004. Article can be found at:
<http://www.ddtwb.com/nov04.shtml>.

Although the article was written prior to the recent legislation and much of Mr. Duff's argument specifically deals with TERI employees, reference to those "not participating in TERI" by Mr. Duff is also instructive with respect to our conclusion herein following the recent amendments. A school district is not required by statute to provide a continuing contract to a teacher who has retired but who has been rehired pursuant to Section 9-1-1790.

Conclusion

For the above reasons, we advise that the General Assembly, by passage of R200 (S.618) of 2005, did not intend the continuing contract provisions of Section 59-26-40 (J) to apply to voluntarily retired teachers who have been rehired pursuant to Section 9-1-1790. As recently amended by R200, § 9-1-1790 authorizes the employer to "hire" a retired employee. Such statute

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thus recognizes that a severance in employment occurs upon voluntary retirement and that a new "hiring" occurs upon return to work. Otherwise, the act of voluntary retirement would be rendered meaningless. Therefore, the statute makes the hiring of a voluntarily retired teacher (or other state employee) a matter of contract between employer and retired employee rather than a "continuing contract" which a teacher may have formerly possessed as a regular employee. Moreover, § 59-26-40(J) – the authority for a continuing contract – speaks to the teacher being "employed," a status which ends upon the teacher's voluntary retirement. See, *Op. S.C. Atty. Gen.*, June 6, 2002, *supra*; see also, *Op. S.C. Atty. Gen.*, November 22, 1983 (within the restrictions of § 9-1-1790, persons under the age of seventy who have previously retired from state service may be *employed* by public employers to fill any position for which they qualify); *Op. S.C. Atty. Gen.*, September 12, 1980 [referencing §§ 9-1-1790 and 9-1-1600 (regarding temporary consultative employment)]. Accordingly, we cannot imply the continuation upon voluntary retirement of the rights of a continuing contract which § 59-26-40(J) bestows. Only the General Assembly may do so by express statutory amendment.

Very truly yours,



Robert D. Cook

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