

April 20, 2007

Eugene R. Baten, Executive Director
Sumter County Commission on Alcohol and Drug Abuse
Post Office Box 39
Sumter, South Carolina 29150

Dear Mr. Baten:

We issue this opinion in response to your letter requesting an opinion as to your participation in the South Carolina Teacher and Employee Retention Incentive Program (“TERI”). In your letter, you included the following information:

I am the Executive Director of the Sumter County Commission on Alcohol and Drug Abuse (SCCADA). I am governed by a nine member Board of Commissioners that is appointed by the Sumter County Council. I, as well as, the employees of SCCADA are not county or State employees. However, our agency is a participant in the SC Retirement System (SCRS) and I am the only employee on the TERI program. Conversely, we have no personnel rules covering this program.

Based on this information, you ask: “since I am not under any contract or a state employee, does my employment end on my TERI termination date (June 30, 2007)?”

You attached a letter from the Director of the South Carolina Retirement System (the “Retirement System”) concerning, among other things, the requirement that a retiree must have a break in service prior to returning to work. You state, according to the attached letter, “State and Federal laws require a severance from employment before I can receive a distribution of my accumulated TERI funds or draw an Annuity. Do I automatically lose my job at the end of my TERI participation? Are there other ways to show ‘severance from employment’ without being terminated?”

Law/Analysis

Section 9-1-2210 of the South Carolina Code (Supp. 2006) governs participation in the TERI program. Subsection (A) generally describes the program as follows:

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(A) An active contributing member who is eligible for service retirement under this chapter and complies with the requirements of this article may elect to participate in the Teacher and Employee Retention Incentive Program (program). A member electing to participate in the program retires for purposes of the system. The program participant shall agree to continue employment with an employer participating in the system for a program period, not to exceed five years. The member shall notify the system before the beginning of the program period. Participation in the program does not guarantee employment for the specified program period.

S.C. Code Ann. § 9-1-2210(A) (emphasis added). Furthermore, subsection (H) of this provision states: “A program participant shall terminate employment no later than the day before the fifth annual anniversary of the date the member commenced participation in the program.” S.C. Code Ann. § 9-1-2210(H). Pursuant to section 9-1-2210, employment for participants in the TERI program terminates after five years of service under the program. This provision appears to apply to all participants in the TERI program and does not differentiate between participants based on their employers. Thus, to answer your question, your employment will terminate on your TERI Termination date.

However, section 9-1-1790 of the South Carolina Code (Supp. 2006) provides a mechanism by which retired members of the Retirement System, including former TERI participants, may be rehired by their employers without affecting their receipt of their retirement benefits. This provision states, in pertinent part:

(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.

S.C. Code Ann. § 9-1-1970(A) (emphasis added). Thus, while your employment terminates upon your completion of the TERI program, this provision allows your employer to rehire you, while not

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disrupting the receipt of your retirement benefits. However, the decision whether to rehire is within the discretion of your employer. As we explained in an opinion issued in 2005, examining section 9-1-1970 in light of the amendments made to that statute by the Legislature that year:

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.

Op. S.C. Atty. Gen., June 20, 2005.

The letter from the Director of the Retirement System (the "Director") attached to your request addresses the issue of the fifteen-day retirement requirement contained in section 9-1-1970(A). In that letter, the Director explained because a participant is considered retired during their participation in the TERI program, "each day of TERI participation counts toward the 15 consecutive calendar days of 'retirement' required before a TERI participant can return to covered employment." However, the Director points out: "Although a TERI participant may satisfy the 15-day retirement through TERI participation, state and federal laws nonetheless require a severance from employment before a TERI participant can receive a distribution of his or her accumulated TERI funds or draw an annuity." The Director further states:

The state separation rule was intended to mirror the federal separation requirement. The Internal Revenue Service (IRS), however, has not issued a ruling on the matter.

Absent an IRS ruling, each employer must determine, in accordance with its personnel rules, the uniform minimum period of time that it would require for a legitimate severance of employment between a member's termination from employment at the end of TERI and the rehiring of the member.

Upon our review of the statutes governing the Retirement System, we note section 9-1-1510 of the South Carolina Code (Supp. 2006), governing retirement, and 9-1-1515 of the South Carolina Code (Supp. 2006), governing early retirement. Both of these provisions list "separated from service" as one of the eligibility requirements for retirement. S.C. Code Ann. §§ 9-1-1510; 9-1-1515. Thus, we presume these provisions are the state law provisions the Director referred to as

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requiring participants have a separation from service in order to receive their TERI funds or retirement distributions.

In our review of the statutes governing the Retirement System, we did not find any further explanation of what constitutes a separation from service for purposes of State retirement. From the Director's letter, we understand the state law provisions were "intended to mirror the federal separation requirement." Furthermore, the Director indicated the Internal Revenue Service has not interpreted what is meant by the separation requirement contained in the Internal Revenue Code. Thus, the Director suggests employers use their own personnel rules to determine what constitutes the minimum amount of time to affect a "legitimate severance of employment."

This Office, just as the courts of this state, "gives deference to the opinion of a state agency charged with the duty and responsibility of enforcing a state statute." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 26, 579 S.E.2d 334, 338 (Ct. App. 2003). Because the Legislature gave the Retirement System oversight over the administration of all state retirement plans, we defer to the Retirement System's interpretation of what is required to affect a separation from service. Accordingly, if your employer decides to rehire you upon your completion of the TERI program, the Retirement System suggests your employer should determine the length of your break in service in accordance with its personnel policies in order to comply with state laws.

Conclusion

Based on our review of state law governing the Retirement System, section 9-1-2210 requires termination of your employment upon your completion of the TERI program. However, we note, pursuant to section 9-1-1790, an employer may rehire a retired employee presuming the employee satisfies the separation requirement mandated by state law.

Very truly yours,

Henry McMaster
Attorney General

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Assistant Attorney General

REVIEWED AND APPROVED BY:

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