ALAN WILSON
ATTORNEY GENERAL

September 26, 2011

The Honorable Dennis C. Moss
Member, House of Representatives
418 Blatt Building
Columbia, South Carolina 29201

Dear Representative Moss,

We received your letter requesting an opinion of this Office concerning school districts and their employees who participate in the Teacher and Employee Retention Incentive (TERI) program. Specifically, you ask the following questions:

1. As an employer, is a school district's consent required for a teacher or other district employee to participate in the TERI program?

2. Is a teacher or other school district employee required to provide notice to the school district of his election to participate in the TERI program?

3. Does a school district have an option as to whether or not to hire the person as a TERI program participant?

4. Does participation in the TERI program "break" a teacher or school district employee's current contract with the district? You explain that in a previous opinion, this Office concluded that continuing contract teachers who retire and return to work are no longer entitled to employment at the continuing contract level. However, this opinion did not address the status of teachers who participate in the TERI program.

5. Can a school district elect not to offer a TERI program participant a contract? You explain you have been otherwise informed that because participation in the program does not guarantee employment for the program period, a teacher who elects to participate in TERI program does not immediately have to be hired back the following year. You were also informed that the rules change, however, once the teacher is hired back as a TERI participant.

6. Once a teacher or district employee is a TERI program participant, should the employee be granted the same rights as other permanent employees?

7. Act No. 97, which was signed into law on April 12, 2011, provides in part: "Notwithstanding another provision of law, school districts uniformly may negotiate salaries below the school district salary schedule for the 2011-2012 school year for retired teachers." Does this provision apply to TERI program participants?

Law/Analysis

The Teacher and Employee Retention Incentive (TERI) program is a creature of statute, the provisions of which are codified, as amended, at S.C. Code Section 9-1-2210 (Supp. 2010). It is a deferred benefit program available to active members of the South Carolina Retirement System ("Retirement System") who are eligible for retirement. The program allows members to elect to retire but continue active employment for up to five years. During the program period participants continue making contributions to the Retirement System, but also receive their allotted monthly retirement benefits. However, receipt of the retirement funds is deferred until the participant's employment is terminated at the end of the five year period or an earlier date.

In our analysis, we will examine the language of the relevant statutory provisions in an effort to determine the Legislature's intent with regards to each of the issues presented. As stated in a prior opinion of this Office dated June 20, 2005:

> 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).
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> 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 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.
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> 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).

Questions 1, 2, & 3

Your first three questions generally ask if State law provides an employer any power or authority to determine whether an employee may or may not participate in the TERI program. After careful review of pertinent statutory law, we conclude that an employer is afforded no such authority.

Participation in the TERI program generally is governed by subsection (A) of Article 17, Chapter 1, of Title 59:

> 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 [TERI 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.

§ 9-1-2210(A) (emphasis added). Pursuant to this subsection, an employee is eligible to participate in the program if the employee is an "active contributing member"[1] and is eligible for service retirement.[2] The language of this provision indicates participation in the program is entirely within the discretion of a member who meets these eligibility requirements – such a member *may elect* to participate. This election is performed by simply notifying *the system* in advance. Section 9-1-2210 sets forth no other procedural hurdles that must be overcome before a member becomes a participant in the program.

The only portion of subsection (A) concerning employers requires that a "program participant" agree to continue employment with an employer who participates in the Retirement System. In this instance, we find significance in the Legislature's use of the words "program participant" as opposed to "member" as otherwise used in this subsection. The plain meaning of "participant" is "[o]ne that participates, shares, or takes part in something." The American Heritage College Dictionary (3rd ed.). Therefore, the agreement to continue employment is required of an individual who has already elected to take part in the program; it is not a condition imposed upon "members" seeking to participate. The use of "program participant" in the additional subsections of 9-1-2210 lends further support to this conclusion.[3] Section 9-1-2210 is otherwise devoid of any provision indicating an employer's consent, or prior notice to an employer, is necessary before a member may participate in the TERI program. Therefore, we believe

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[1] § 9-1-10(2) defines an "active member" as "an employee who is compensated by an employer participating in the system and who is making regular contributions to the system."

[2] The only eligibility exception is found in subsection (I), which disqualifies members who have "participated previously in and received a benefit under [the TERI] program or any other state retirement system." § 9-1-2210(I).

[3] *See, e.g.,* § 9-1-2210(C) ("*During the specified program period*, the employer shall pay to the system...with respect to any *program participant* it employs") (emphasis added); § 9-1-2210(E) ("a *program participant* is considered to be an active employee...and is not subject to the earnings limitation...*during the program period*").

the Legislature intended for a member to become a participant of the TERI program regardless of whether an employer was provided notice of and/or consented to the employee's election to participate.

Your third question asks whether a TERI participant must be hired as such. The duties of employers who hire TERI participants are addressed in subsection (C) of the statute:

> During the specified program period, the employer *shall* pay to the system the employer contribution for active members prescribed by law with respect to *any program participant it employs*, regardless of whether the program participant is a full-time or part-time employee, or a temporary or permanent employee. . . . If an employer who is *obligated* to the system pursuant to this subsection fails to pay the amount due, as determined by the system, the amount must be deducted from any funds payable to the employer by the State.

§ 9-1-2210(C) (emphasis added). The language of this subsection clearly mandates an employer's compliance with regards to the employment of *any* TERI participant: "the employer *shall pay* . . . with respect to *any* program participant it employs" and is "*obligated* to the system." Clearly, the Legislature did not intend for employers to have the right to determine whether or not their employees may participate, or otherwise continue participating, in the program as a condition of employment. Therefore, if an employer wishes to hire an individual who is a participant in the TERI program, that individual must be employed as a TERI participant or not employed at all.

In light of the above conclusions, we believe the Legislature intended for participation in the TERI program to be the result of an agreement between an employee and the Retirement System only. An employer lacks the authority to determine whether an employee may participate in the program. In addition, an employer who participates in the Retirement System is required under State law to honor the "program participant" status of any individual it employs. Further support for each of these conclusions is found when Section 9-1-2210 is read in conjunction with another statute concerning the provisions of Chapter 1 of Title 59:

> All agreements or contracts with members of the System pursuant to any of the provisions of this chapter *shall be deemed solely obligations of the Retirement System* and the *full faith and credit of this State* and of its departments, institutions and political subdivisions *and of any other employer* is not, and shall not be, pledged or obligated beyond the amounts which may be hereafter annually appropriated by such employers in the annual appropriations act, county appropriations acts and other periodic appropriations for the purposes of this chapter.

§ 9-1-1690 (emphasis added).

Questions 4, 5 & 6

Questions four through six concern the effect of TERI participation on the employment and dismissal rights of school district employees. Participation in the TERI program is contingent upon continued employment during the program period; however, participation in the program does not operate as a guarantee of employment for the duration of the maximum five year period. § 9-1-2210(A).

Although a TERI participant is considered to be "retired" from the Retirement System upon entering the program under subsection (A), a participant is considered to be an "active employee" for employment purposes under subsection (E). When the Legislature created the TERI program in 2001, subsection (E) was initially drafted as follows:

> A program participant is retired for retirement benefit purposes only. For employment purposes, a program participant is considered to be an active employee, retaining all other rights and benefits of an active employee and is not subject to the earnings limitation of Section 9-1-1790 during the program period.

§ 9-1-2210(E) (Supp. 2001) (emphasis added). In 2005, the Legislature amended this subsection to provide that a TERI participant retains "all other rights and benefits of an active employee *except for grievance rights pursuant to Section 8-17-370* . . . ." §9-1-2210(E) (Supp. 2005).

The language of subsection (E) clearly manifests the Legislature's intent that TERI participants are not to be treated as retirees for purposes of employment. A participant is *only* considered to be retired for the sake of receiving retirement benefits; thus, TERI participants are not subject to all statutory provisions and limitations applicable to other retirees. With regards to employment, under the prior version of subsection (E) the employment rights and benefits a participant retained were all inclusive – *all* other rights and benefits of an active employee. Thus, participants experienced no change with regards to employment status or the rights and benefits associated with their position. Under the amended version, the rights excluded are specifically limited to "grievance rights pursuant to Section 8-17-370." Clearly, these are *only* rights a participant forfeits upon entering the TERI program. Therefore, we must examine these grievance rights in order to determine the nature and effect of their exclusion under Section 9-1-2210(E). More importantly, we must determine who is entitled to these grievance rights.

Section 8-17-370 provides that the provisions of the State Employee Grievance Procedure Act ("Grievance Act"), Sections 8-17-310 to -380, do not apply to TERI participants. The Grievance Act requires state "agencies" to establish grievance procedures through which "covered employees" may internally challenge certain adverse employment actions. The Retirement System has described the exclusion of state grievance rights pursuant to Section 9-1-2210(E) as having the following effect:

> TERI participants employed by an agency that adheres to state personnel policies will be exempt from the State Employee Grievance Procedure Act. This means your employment as a TERI participant is at will. If a TERI participant works for an employer that is not governed by state personnel policies, the TERI participant would be subject to his employer's policies regarding employment status and rights.

SCRS Member Handbook (S.C. Retirement System, July 2010).[4]

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[4] As explained in a prior opinion: "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.'" Op. Att. Gen. April 20, 2007 (*quoting* Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 26, 579 S.E.2d 334, 338 (Ct. App. 2003)). The Legislature gave the Retirement System oversight over the administration of all state retirement plans. Accordingly, we refer to the Retirement System's interpretation on this issue.

However, school district employees are not covered under the Grievance Act. By its very title, the State Employee Grievance Procedures Act only covers *state* employees. Moreover, the definition of an "agency" for purposes of the Grievance Act does not extend to political subdivisions or other units of local government such as a school district. § 8-17-320(1). The Legislature has separately provided school districts the power to employ and dismiss certain employees,[5] and the power to adopt policies necessary and proper in furtherance of this power. *See* § 59-19-110 ("The boards of the several school districts may prescribe such rules and regulations not inconsistent with the statute law of this State as they may deem necessary or advisable to the proper disposition of matters brought before them"). Therefore, school district policies concerning the employment and dismissal of employees remain unaffected by the exclusion of state grievance rights pursuant to Section 9-1-2210(A). Therefore, we believe the Legislature intended for school district employees to retain all of the rights and benefits associated with the position they held at the time they entered the TERI program in accordance with district personnel policies.

Nonetheless, school district policies and personnel decisions must conform with State law. *See* § 59-19-110, supra; Armstrong v. Sch. Dist. Five of Lexington & Richland Counties, 26 F. Supp. 2d 789, 792 (D.S.C. 1998) ("[defendant] is a public school district organized under the laws of South Carolina and subject to all statutes which govern its operation"). In Title 59 of the S.C. Code, the Legislature has prescribed certain procedures, rights, protections, and benefits that must be afforded to various employees of school districts. Continuing contract teachers receive the most statutory protection. These are teachers whose contracts "are renewed annually by the [d]istrict unless the [d]istrict fires the teachers for cause." Davis v. Greenwood School Dist. 50, 365 S.C. 629, 632, 620 S.E.2d 65, 66 n.1 (2005). These teachers are entitled to "full procedural rights" relating to employment and dismissal as provided in Article 3, Chapter 19 of Title 59, and the Teacher Employment and Dismissal Act, Sections 59-25-410 to -530.[6] *See* § 59-26-40(J). In addition, our state Supreme Court has repeatedly held continuing contract teachers have a property interest in continued employment as a teacher pursuant to the Teacher Employment and Dismissal Act.[7]

Accordingly, this Office is of the opinion that continuing contract teachers who enter the TERI program retain, among other things, the right to have their contract renewed on an annual basis for the

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[5] *See, e.g.*, § 59-19-90(2) (providing board of trustees of a school district shall "[e]mploy teachers from those having professional certificates from the State Board of Education, fix their salaries and discharge them when good and sufficient reasons for so doing present themselves").

[6] Induction and annual contract teachers are excluded from protection under the employment and dismissal provisions of Article 3, Chapter 19, and Article 5, Chapter 25, of Title 59. § 59-26-40(C), (H). However, annual contract teachers who are not reemployed are granted the right to timely request a hearing before the district superintendent, and then appeal the district superintendent's decision to the school district board of trustees. § 59-26-40(H).

[7] *See* Snipes v. McAndrew, 280 S.C. 320, 313 S.E.2d 294 (1984); Johnson v. Spartanburg Co. Sch. Dist. No. 7, 314 S.C. 340, 444 S.E.2d 501 (1994); Henry-Davenport v. Sch. Dist. Of Fairfield County, 391 S.C. 85, 705 S.E.2d 26 (2011). Further, pursuant to Section 59-24-15 (Supp. 1998), a certified educator employed as an administrator on an annual or multi-year contract retains this right to continued employment as a *teacher*, but not with respect to the *position or salary of administrator*. Henry-Davenport at 89, 705 S.E.2d at 26.

duration of the program period in accordance with the provisions of the Teacher Employment and Dismissal Act. Thus, participation in the TERI program does not "break" a teacher's continuing contract with the district, and such teachers are to be afforded the same rights as non-TERI continuing contract teachers. However, we emphasize that these conclusions are specific to the statutory rights afforded to continuing contract teachers who participate in the TERI program. The effect of TERI participation on the employment and dismissal rights of other individual school district employees must be determined on a case-by-case basis in accordance with district personnel policies and any relevant statutory law. Such individual determinations are outside the scope of this opinion.

We perceive no conflicts between our present conclusions and those of a prior opinion issued by this Office on June 20, 2005. In that opinion, we addressed the issue of whether a teacher who has retired and returned to work for a school district pursuant to Section 9-1-1790 must be employed at the continuing contract level. Section 9-1-1790 provides, in relevant part: "A retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment . . . without affecting the monthly allowance he is receiving from the system." Relevant to the questions at hand, we determined that Section 9-1-1790 "requires a 'break' in service before the retired individual may return to work." We found the use of the word "may" in conjunction with "hire" indicative of the Legislature's intent that employers be given discretion in determining who to rehire and in negotiating the terms of employment. Further, we found that voluntary retirement severs the employment relationship. As a result, we concluded teachers who retired and returned to work pursuant to Section 9-1-1790 were no longer entitled as matter of right to employment at the continuing contract level.

The statutory provisions governing participation in the TERI program are entirely distinguishable from those governing a retiree's return to work. Section 9-1-2210 has no provision requiring a "break" in service before an employee may participate in the TERI program. To the contrary, a TERI participant must agree to "continue employment." There is no language in Section 9-1-2210 indicating an employer has any discretionary authority concerning an employee's participation in the program. To the contrary, participation is completely within the discretion of an eligible employee who "may elect" to participate. Furthermore, the agreement concerning participation in the program is made between an employee and the Retirement System – continued employment is simply necessary for participation to continue for the duration of the program period. In addition, a TERI participant "is retired for benefit purposes only," and otherwise retains the rights and benefits of an active employee during the program period. Therefore, we do not believe the Legislature intended for active employees to experience a "break" in service or a severance in the employment relationship as a result of participating in the TERI program. In light of the above distinctions, we believe our 2005 opinion continues to provide an accurate statement of the law, and reaffirm our present conclusion that teachers participating in the TERI program maintain their continuing contract status.

Question 7

Your last question concerns a recently enacted joint resolution. As provided in your letter, Section 3 of the joint resolution provides as follows:

> Notwithstanding another provision of law, school districts uniformly may negotiate salaries below the school district salary schedule for the 2011-2012 school year for retired teachers.

Act No. 97, 2011 Acts and Joint Resolutions. This joint resolution was ratified by the Legislature on April 6, 2011, and signed into law by the Governor on April 12, 2011. Your question asks whether "retired teachers," as used in the joint resolution, includes TERI participants. However, Section 1 of the joint resolution required school districts to notify teachers of their employment for the 2011-2012 year by May 15, 2011.

As stated in a prior opinion, it is "the policy of this Office not to issue an opinion on any question which has or will become moot." Op. Atty. Gen., Oct. 27, 1999 (*citing* Mathis v. S.C. Highway Dept., 260 S.C. 344, 195 S.E.2d 713 (1973)). The deadline for negotiating contracts with teachers for the 2011-2012 school year has passed, and thus the provision has no future application; therefore, the issue presented is moot.

Very truly yours,

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REVIEWED AND APPROVED BY:

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