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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

May 20, 2003

Samuel L. Wilkins, Director  
Office of Human Resources  
1201 Main Street, Suite 1000  
Columbia, South Carolina 29201

Dear Mr. Wilkins:

You have sought an opinion on H.3829, approved by Governor Sanford on April 21, 2003. The joint resolution provides for certain military leave for permanent full-time state employees to be used for absences occurring in calendar year 2003. Your question is whether or not the Joint Resolution is retroactive so as to authorize leave benefits for military absences which occur between January 1, 2003 and April 21, 2003. It is our opinion that the Joint Resolution authorizes such leave.

The issue arises because Section 2 of the Joint Resolution states that it "takes effect upon approval by the Governor" – in this instance, April 21, 2003. You correctly note that the legal presumption is that legislation is to be given a prospective rather than retroactive effect, absent clear intent to the contrary. Thus, there is a question of whether coverage exists with respect to those absences for military duty between January 1, and April 21, 2003. By way of background, you elaborate as follows:

The conflict between the text of section 1(A) where the provision speaks to absences in calendar year 2003 and the effective date identified in section 2 gives rise to a question whether this provision should be interpreted to authorize leave benefits established in this joint resolution for military absences which occur between January 1, 2003, and April 21, 2003. I refer you to Section 8-7-90, which provides that, "... The provisions of this section must be construed liberally to encourage and allow full participation in all aspects of the National Guard and reserve programs of the armed forces of the United States. . ." I further note that "Operation Enduring Freedom," "Operation Noble Eagle," and the hostilities in Iraq all commenced prior to April 21, 2003, and are continuing.

This is clearly a matter of significant interest and importance and thus we request the opinion of the Office of Attorney General as to whether the provision should be given a retroactive or prospective effect. We further respectfully request an expedited review since time is of the essence.

*Respectfully,*

Law / Analysis

H.3829, by its title is

A JOINT RESOLUTION TO ALLOW STATE EMPLOYEES WHO ARE MEMBERS OF THE FEDERALIZED NATIONAL GUARD UNITS OR ACTIVATED RESERVE UNITS, OR MEMBERS OF NATIONAL GUARD UNITS OR RESERVE UNITS WHO HAVE VOLUNTEERED FOR ACTIVE DUTY TO USE UP TO FORTY-FIVE DAYS OF ACCRUED ANNUAL LEAVE IN CALENDAR YEAR 2003 AND TO ALLOW SUCH EMPLOYEES TO USE UP TO NINETY DAYS OF ACCRUED SICK LEAVE IN CALENDAR YEAR 2003 AS IF IT WERE ANNUAL LEAVE WITHOUT REGARD TO THE THIRTY-DAY LIMIT ON ANNUAL LEAVE THAT MAY BE USED IN A YEAR AND TO PROVIDE THE MILITARY SERVICE FOR WHICH THESE PROVISIONS APPLY."

The Joint Resolution further provides in pertinent part as follows:

SECTION 1. (A) Notwithstanding the provisions of Section 8-11-610 of the 1976 Code, permanent full-time state employees described in subsection (B) of this section may use up to forty-five days of accumulated annual leave in calendar year 2003 in connection with absences resulting from military service described in subsection (B) of this section. In addition, and without regard to the limit on annual leave that may be accrued or used in a calendar year as provided in Section 8-11-610, a permanent full-time state employee, for absences in connection with military service described in subsection (B) of this section in calendar year 2003, may use accumulated sick leave not to exceed ninety days as if it were annual leave.

(B) The leave provisions of subsection (A) of this section apply to a permanent full-time state employee who:

(1) is a member of the National Guard serving in a unit federalized for duty in "Operation Enduring Freedom" or "Operation Noble Eagle," or is a member in a unit federalized for duty in connection with potential or actual hostilities in Iraq, or any combination of these duties, and performs such duty; or

(2) is a reservist called to active duty pursuant to "Operation Enduring Freedom" or "Operation Noble Eagle," or serves in a unit called to active duty in connection with potential or actual hostilities in Iraq, or any combination of these duties, and performs such duty; or

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(3) is a member of the National Guard or a reservist and volunteers for duty in connection with the operations described in items (1) and (2) of this subsection and performs such duty.

### **Time effective**

SECTION 2. This joint resolution takes effect upon approval by the Governor.

A number of principles of statutory construction are relevant to your inquiry. First and foremost, is the cardinal rule that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). However, our Supreme Court has cautioned against an overly literal interpretation of a statute which may not be consistent with legislative intent. In Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942), the Court recognized that

[i]t is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words. Id., at 368-369.

In addition, a statute will be construed to avoid an absurd result. Any statute must be interpreted with common sense to avoid unreasonable consequences. U.S. v. Rippetoe, 178 F.2d 735 (4<sup>th</sup> Cir. 1950). A sensible construction rather than one which leads to irrational results, is always warranted. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Finally, the context of the statute must be examined as part of the process of determining the intent of the General Assembly. Hancock v. Southern Cotton Oil, Co., 211 S.C. 432, 45 S.E.2d 850 (1948). As the Court put it in Southern Mutual Church Ins. Co. v. S. C. Windstorm and Hail Underwriting Assn., 306 S.C. 339, 412 S.E.2d 377 (1991),

[c]learly, words in a statute must be construed in context. Hancock, [supra]. According to the doctrine of noseitur a sociis, the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute. 73 Am.Jur. 2d, Statutes, § 213 (1974). We have previously stated that "[t]he Court may not, in order to give affect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious

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intent.” Creech v. S.C. Public Service Commission, 200 S.C. 127, 20 S.E.2d 645, 649 (1942).

306 S.C. at 342.

In terms of a statute’s applicability, it is well understood that the retrospective operation of a statute is not favored by the courts. Sutherland, Statutory Construction, § 41.04 (4<sup>th</sup> ed. 1986). Statutes are thus presumed to be prospective in effect. U.S. Rubber Co. v. McManus, 211 S.C. 342, 349, 45 S.E.2d 335, 338 (1947). It has long been held in South Carolina that “[i]n the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary.” S.C. Dept. of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000). Accordingly, our Supreme Court has frequently recognized that “[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt.” Am. Nat. Fire Ins. Co. v. South Grading and Paving, 317 S.C. 445, 454 S.E.2d 897 (1995).

As the Court observed in Hyder v. Jones, 271 S.C. 85, 88, 245 S.E.2d 123, 125 (1978), quoting Ex Parte Graham, 47 S.C. Law (13 Rich. Law) 53 at 55-56 (1864):

the party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough, if it is not satisfied that the Legislature did intend such effect.

See also, Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965).

The exception to the foregoing rule regarding statutes typically being given a prospective effect is if the statute is remedial or procedural. See, Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980). [“(a) principal exception to the ... presumption (of prospective effect) is that remedial or procedural statutes are generally held to operate retrospectively.”]. See also, Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990); Hyder v. Jones, *supra*.

In Smith v. Eagle Const. Co. Inc., 282 S.C. 140, 318 S.E.2d 8 (1984), the Supreme Court of South Carolina commented upon the “remedial” exception as follows:

“[s]tatutes are remedial and [retroactive], in the absence of directions to the contrary, when they create new remedies for existing rights ... enlarge the rights of persons under disability, and the like, unless [they] violate some contract obligation ... . Statutes directed to the enforcement of contracts, or merely providing an additional

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remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts.” Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843, 846 (1941).

318 S.E.2d at 9. In Smith, the Court held that an amendment to a statute, which was enacted after a construction employee was injured in an industrial accident, and which provided for lifetime replacement of prosthetic devices would be given retroactive effect. The Smith Court’s analysis was that

[w]e hold the 1980 amendment to S.C. Code Ann. 42-15-60 (1976) to be remedial in nature as it enlarges the rights of an individual under a disability without violating an existing contractual obligation. Consequently, we conclude the amendment should be given retroactive effect and hold Smith is entitled to lifetime repairs and replacement of his prosthetic device.

Id., at 9.

Therefore, for a number of reasons, we conclude that H.3829 must be interpreted to authorize leave benefits for military absences which occur between January 1, 2003 and the effective date of the Joint Resolution – April 21, 2003.

First, H.3829 makes several references to authorize state employees to use leave for military service “in calendar year 2003.” The fact that the General Assembly was careful to use the term “calendar year” clearly evinces an intent to refer back to January 1, 2003 – the beginning of the “calendar year.” The literal meaning of the term “calendar year 2003” must necessarily extend for all of the year – the period of twelve months between January 1 and December 31, 2003. See, Jensen v. Johnson County Youth Baseball League, 838 F.Supp. 1437 (D.Kan. 1993). If the statute were read to mean that the Legislature intended the law’s effect to begin only on April 21, 2003, use of the literal language of “calendar year 2003” would be eroded and undermined.

Furthermore, when we examine the Joint Resolution in its entirety, the General Assembly’s intent is apparent. Subsection (B) of H.3829 makes the Joint Resolution applicable to a permanent full-time state employee who is either a member of the National Guard federalized for duty concerning a reservist called up as a part of the recent war in Iraq and operations related thereto. While hostilities actually began in March of 2003, the activation and call-up of military personnel for duty as part of that operation was ongoing at the beginning of calendar year, 2003. In our opinion, H.3829 must thus be interpreted in light of this historical context in which it was enacted. Such historical context further supports the application of H.3829 as of January 1, 2003. Moreover, this reading would be quite consistent with use of the term “calendar year 2003” as employed by the General Assembly therein. On the other hand, to construe the Joint Resolution as only beginning to apply after the hostilities in Iraq have ended and military personnel are beginning to return home would not fully effectuate legislative intent.

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It is true that Section 2 of H.3829 states that “[t]his joint resolution takes effect upon approval by the Governor.” Certainly, given the presumption that all statutes apply prospectively, without more, we would be required to read the statute as being effectual only as of April 21, 2003. However, the Joint Resolution in question here must be construed in its entirety, and consistent with other portions thereof. Use of the literal language “calendar year 2003” in other parts of the Joint Resolution, as well as the historical context of H.3829’s enactment militate in favor of the application of the enactment as of January 1, 2003, rather than April 21, 2003. Such a reading would be more consistent with the historical facts surrounding the Joint Resolution which are enunciated by the General Assembly in Section 2 thereof. The Legislature therein uses phrases such as “a unit federalized for duty in ‘Operation Enduring Freedom’ or ‘Operation Noble Eagle’” and “a member of a unit federalized for duty in connection with potential or actual hostilities in Iraq ... .” (emphasis added). The same phraseology is used with respect to reservists. Of course, hostilities in Iraq began well before April 21, 2003. Moreover, “Operation Noble Eagle” – formed to protect homeland security – was initiated before even January 1, 2003. As you state in your letter, “‘Operation Enduring Freedom,’ ‘Operation Noble Eagle,’ and the hostilities in Iraq all commenced prior to April 21, 2003, and are continuing.” We agree with your analysis.

In addition, H.3829 (now R.58) must be construed in light of the mandate by the General Assembly contained in § 8-7-90 that provisions relating to military leave for government employees must be “construed liberally to encourage and allow full participation in all aspects of the National Guard and reserve programs of the armed forces of the United States.” Accordingly, for all of these reasons, it is our opinion that H.3829 must be interpreted as authorizing leave benefits as established in this joint resolution for military absences which occur between January 1, 2003 and April 1, 2003 as well as thereafter. Therefore, even though the Joint Resolution’s effective date is April 21, 2003, we interpret the Joint Resolution as being intended to be retroactive to January 1, 2003.

In addition, it is at least arguable that application of the Joint Resolution to military absences which occur beginning January 1, 2003 is not giving retroactive effect to the enactment at all. It is well recognized that a statute “‘is not regarded as operating retroactively because of the mere fact that it relates to antecedent events.’” Crelghan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867, 870 (1957), quoting 50 Am.Jur., Statutes, § 476. [Heart and Lung Act applies to city firemen disabled by respiratory tuberculosis where tubercular conditions existing on effective date resulted from events occurring before effective date]. This rule has been recognized in numerous other decisions as well. See, e.g. Burger v. Unemployed Compensation Board of Review, 168 Pa.Super. 89, 77 A.2d 737 (1951) [employee is entitled to benefits of unemployment compensation for lock-out under statute amending law so as to permit recovery therefor where lock-out began before statute’s effective date and continued thereafter]; Hill v. City of Billings, 134 Mont. 282, 328 P.2d 1112 (1958) [application of statute increasing wages by \$3.50 per month for each year of a police officer’s previous service was applicable to service prior to the effective date of the amendment; statute is not retroactive application of the amendment].

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The foregoing cases are analogous to this situation. In Burger, supra, the Court concluded that the employment relationship was not severed by the continuing lock-out, but was simply interrupted – just as the work of those affected is here. As the Court noted, “[t]here was a lock-out on June 1, the effective date of the amendment and, although it commenced prior to that date, the amendment applied to it, and appellant was entitled to compensation under it.” 77 A.2d at 739. In City of Billings, supra, the Court noted that “the Legislature drew no distinction between years of service performed before July 1, 1957, and those performed after that date.” 328 P.2d at 1116. Likewise, here, it appears that the General Assembly did not distinguish between military service regarding the events relative to the conflict in Iraq which was performed before the effective date of the Joint Resolution – April 21, 2003 – and that which is performed afterwards. The principal limitation contained in the legislation is that such service be for “calendar year 2003.” Accordingly, this Joint Resolution could be viewed by a court as not retroactive, but as legislation which is deemed to apply to the current conflict in Iraq and military service of state employees related thereto.

Nor do we believe H.3829 violates Article III, § 30 of the South Carolina Constitution which provides that “[t]he General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered or contract made ....” “Extra compensation” within the meaning of Article III, § 30 “is generally defined as any compensation over and above that fixed by law or contract at the time the service was rendered.” State ex rel. McLeod v. McLeod, 270 S.C. 557, 559, 243 S.E.2d 446, 447 (1978).

While there is authority to the contrary, see, State ex rel. McLeod v. McLeod, supra, we are of the opinion that this situation is most closely analogous to the South Carolina Supreme Court decision of Bales v. Aughtry, 302 S.C. 262, 395 S.E.2d 177 (1990). There, Richland County Council voted to discontinue the practice of allowing elected officials sick and annual leave, but subsequently voted “to pay the elected officials for their accumulated leave before January 1989.” This payment was challenged on the basis that it violated Article III, § 30. The trial court agreed with this argument, but the Supreme Court reversed. The Court concluded that

[l]eave benefits are part of compensation earned for services rendered and the right to receive that compensation vests once the services are rendered. See Gilman v. County of Cheshire, 126 N.H. 445, 493 A.2d 485 (1985); Ebert v. Stark County Board of Mental Retardation, 63 Ohio St.2d 31, 406 N.E.2d 1098 (1980). Payment for accrued leave benefits does not constitute extra compensation after services rendered. We hold the trial judge erred in finding a violation of article III, § 30 of our state constitution. Accord Vangilder v. City of Jackson, 492 S.W.2d 15 (Mo. App. 1973); City of Orange v. Chance, 325 S.W.2d 838 (Tex. Civ. App. 1959).

302 S.C. at 264. Here, we must presume that H.3829 is valid and constitutional. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 779 (1939). A statute “must continue to be followed until a court declares otherwise.” Op. Atty. Gen., June 11, 1997. In this instance, the state employees in question have already earned the annual

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and sick leave involved. The legislation references "accumulated" leave. Thus, there is no "extra compensation" at issue. Accordingly, based upon the foregoing, it is our opinion that H.3289 is constitutional.

**Conclusion**

It is our opinion that H.3829 which provides for additional leave benefits for permanent full-time state employees called to military service as apart of the hostilities in Iraq, should be interpreted as authorizing such leave benefits for military absences which occur between January 1, 2003 and April 21, 2003 as well as afterwards. It is our further opinion that this Joint Resolution is constitutional under Article III, § 30 of the South Carolina Constitution which prohibits "extra compensation" for services rendered.

Yours very truly,

A handwritten signature in black ink, appearing to read "Henry McMaster", with a long horizontal flourish extending to the right.

Henry McMaster

HM/an