ALAN WILSON
ATTORNEY GENERAL

September 5, 2013

Derrick McFarland, General Counsel
SC Department of Employment and Workforce
Post Office Box 8597
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Dear Mr. McFarland:

Your agency, the South Carolina Department of Employment and Workforce ("DEW"), seeks an opinion regarding the construction of S.C. Code Ann. Section 41-3-5. By way of background, you state in your request letter the following:

> I request an Attorney General's opinion regarding the definition of "Benefit ratio" as defined in S.C. Code Ann. § 41-3-5 (Rates of contribution to the Unemployment Trust Fund) and applied to Tax Year 2014. The Department of Employment and Workforce will be making the calculations in November 2013 .... Under one theory, § 41-31-5(a) would apply to tax year 2014 because the calculations will be done in 2013. Under another theory, § 41-31-5(b) would apply to any tax year from January 1, 2014 forward. Should the benefit ratio for Tax Year 2014 be governed by § 41-3-5(a) (forty calendar quarters or 10 year "look back" period) or § 41-31-5(b) (twelve calendar quarters or 3 year "look back" period)?

Law / Analysis

Section 41-31-5 provides as follows:

> As used in this chapter:
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> (1) "Benefit ratio" means:
>
> (a) for the period of January 1, 2011, through December 31, 2013, the number calculated by dividing the sum of all benefits charged to an employer during the forty calendar quarters immediately preceding the calculation date by the sum of the employer's taxable payroll for the same period. If fewer than forty but more than one calendar quarter of data are available, the data from those

available calendar quarters shall be used in the calculation. The benefit ratio must be calculated annually using data for quarters filed through June thirtieth of the current year to the sixth decimal place;

(b) from January 1, 2014, the number calculated by dividing the sum of all benefits charged to an employer during the twelve calendar quarters immediately preceding the calculation date by the sum of the employer's taxable payroll for the same period. If fewer than twelve but more than one calendar quarters of data are available, the data from those available calendar quarters shall be used in the calculation. The benefit ratio must be calculated annually using data for quarters filed through June thirtieth of the current year to the sixth decimal place.

(2) "Department" means the Department of Employment and Workforce.

(3) "Statewide average required rate" means the amount of income projected to be needed by the unemployment insurance trust fund for the upcoming calendar year divided by the estimated taxable wages over the same period rounded to the sixth decimal place.

(4) "Statewide average interest surcharge" means the amount of income projected to be needed to pay interest on outstanding federal advances during the upcoming calendar year divided by the estimated taxable wages for the upcoming calendar year.

Further, § 41-31-50 states:

§ 41-31-50. Determination of tax rates.

Each employer eligible for a rate computation shall have his tax rate determined in the following manner:

(1)(a)(i) Annually the department must calculate a contribution rate for each employer qualified for an experience rating. The contribution rate must correspond to the rate calculated for the employer's benefit ratio class.

(ii) To determine an employer's benefit ratio rank, the department must list all employers by increasing benefit ratios, from the lowest benefit ratio to the highest benefit ratio. The list must be divided into classes ranked one through twenty. Each class must contain approximately five percent of the total taxable wages, excluding employers with less than twelve months of accomplished liability, employers with outstanding tax liens, delinquent tax class employers, and employers who reimburse the department in lieu

of contributions, paid in covered employment during the four completed calendar quarters immediately preceding the computation date. Each employer must be placed in the class that corresponds with the employer's benefit ratio.

(iii) If an employer's taxable wages qualify the employer for two separate classes, the employer shall be afforded the class assigned the lower contribution rate. Employers with identical benefit ratios shall be assigned to the same class.

(b) The income needed to pay benefits for the calendar year plus any applicable income needed to reach the solvency target must be divided by the estimated taxable wages for the calendar year. The result rounded to the next higher one-hundredth of one percent is the average required rate needed to pay benefits and achieve solvency targets.

(c) The rate for class twenty will be set such that the entire schedule raises the income required to pay benefits for the year, as well as the income necessary to move the trust fund toward the solvency target, subject to the structure provided in this chapter. However, the rate for class twenty must be at least five and four-tenths percent.

(2)(a) If the calculated rate necessary for benefit rate class twenty exceeds five and four-tenths percent, then the rate for each preceding benefit rate class shall be equal to ninety percent of the rate calculated for the succeeding class, except that rate class twelve shall be set at one-fourth the rate calculated for class twenty, provided that the rate for class one shall be zero.

(b)(i) If the computed rate necessary for class twenty is less than five and four-tenths percent, then the rate for class twenty shall be set at five and four-tenths percent.

(ii) The rate for rate class twelve shall be calculated by multiplying the average tax rate computed in item (1)(b) by twenty, subtracting five and four-tenths percent, and dividing by nineteen.

(iii) The contribution rate for rate classes eleven through one shall be equal to ninety percent of the rate for the succeeding class, provided that the rate for class one shall be zero.

(iv) The contribution rate for class thirteen shall be equal to one hundred twenty percent of the rate calculated for rate class twelve.

> (v) The contribution rate for rate class nineteen shall be set at an amount that allows for average contributions, beginning with class eighteen and ending with class fourteen, that are equal to ninety percent of the preceding class.
>
> (3) For calendar year 2011 and any subsequent calendar year, voluntary payments are not permitted for the purpose of obtaining a lower rate of required contributions.
>
> (4) For tax year 2011, no employer shall have a base tax rate higher than the base tax rate for rate class twelve if during the applicable rate computation period, as defined in Section 41-31-5, the employer has been credited with more in tax contributions than have been charged to that employer's account for benefits.

Additionally, § 41-31-40 discusses the rate computation period and provides as follows:

> **§ 41-31-40. Base rate computation periods.**
>
> Each employer's base rate for the twelve months commencing January first of any calendar year is determined in accordance with Section 41-31-50 on the basis of his record up through June thirtieth of the preceding calendar year, but no employer's base rate is less than the rate applicable for rate class twelve until there have been twelve consecutive months of coverage after first becoming liable for contributions under Chapters 27 through 41 of this title. Each employer who completes twelve consecutive calendar months of coverage after first becoming liable for contributions during the current calendar year shall have a base rate computed on the basis of his record up through the next occurring June thirtieth, with that base rate being effective for the next calendar year beginning in January.

In attempting to construe a statute, such as § 41-31-5, a number of principles of statutory construction are applicable. First and foremost, the cardinal rule of construction is to ascertain the intent of the General Assembly. *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 59, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature will be deemed controlling over the literal words used in the statute. *Greenville Baseball Club v. Bearden*, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time the statute was enacted may be used to assist in interpreting the meaning of an ambiguous statute. *Id.* A statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. *Bearden*, 20 S.E.2d 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).

Important also in the construction of any statute is the interpretation given by the administrative agency charged with enforcement and administration of the statute, in this case, DEW. As our Court of Appeals has stated, "agencies charged with enforcing statutes ... receive deference from the courts as to their interpretations of those laws." *State v. Sweat*, 379 S.C. 367, 385, 665 S.E.2d 645, 655 (Ct. App. 2008). Our Supreme Court has recognized this fundamental principle of deference to an administrative agency interpretation in *Logan v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986), when it concluded that "construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Particularly will the courts defer to the agency's interpretation of a statute where, as here, "the agency's construction lies within its area of expertise." *Op. S.C. Atty. Gen.*, January 5, 2011 (2011 WL 380157). Our Supreme Court has applied this rule to the interpretations rendered by the Employment Security Commission, the predecessor agency to DEW. *See Faile v. S.C. Employment Security Comm.*, 267 S.C. 536, 230 S.E. 219 (1976). Thus there is no question here that considerable deference will be given to any construction by DEW of the statutes which it must administer. For all these reasons, therefore, "[i]t is this Office's longstanding policy ... to defer to the [interpretation of] the administrative agency charged with the regulation [of] ... the subject matter." *Op. S.C. Atty. Gen.*, August 9, 2013 (2013WL 4497164).

Section 41-31-5 was amended in 2011 by Act No. 63 of 2011. The amendment, among other things, removed the benefit ratio calculation date of "on July first" without replacing a calculation date. According to the Annotations prepared by the Code Commissioner, the complete effect of the 2011 amendment upon the definition of "benefit ratio" was as follows:

> [t]he 2011 amendment in subsections (1)(a) substituted "sum" for "average", "sum of the employer's" for "employer's average", and "for" for "during" in the first sentence, substituted "one calendar quarter" for "four calendar quarters" in the second sentence, and substituted "using data for quarters filed through June thirtieth of the current year" for "on July first" in the third sentence; and in subsection (B) in the first sentence substituted "sum" for "average", "sum of the employer's" for "employer's average", and "for" for "during", in the second sentence substituted "one calendar quarters" for "four calendar quarters", and in the third sentence substituted "using data for quarters filed through June thirtieth of the current year" for "on July first".

However, there is no indication in these legislative changes, in 2011, as to how your question should be answered. We thus agree with your assessment, stated in your request letter, that § 41-31-5 is ambiguous and that there are two possible interpretations of the statute available.

In such circumstances, it is the policy of this Office, as well as the courts to defer to the agency's interpretation. As we have recognized in our previous opinions, "it is not necessary that the administrative agency's construction be the only reasonable one or even the one the court would have reached if the question had initially arisen in a judicial proceeding. Typically,

so long as an administrative agency's interpretation of a statutory provision is deemed to be reasonable. We defer to the agency's construction." *Op. S.C. Atty. Gen.,* January 20, 2006 (2006 WL 269609).

As noted above, there is nothing in the statutory enactment in 2011 which would indicate how § 41-31-5 should be interpreted, and whether a "ten year" look back or a "three year" look back is applicable. Examination of the Title to Act No. 63 of 2011 simply states that the Act amends "Definitions Concerning the Rate of Contributions To the Unemployment Trust Fund So As To Modify the Method of Computation. ..." However, the Title does not indicate what the Legislature intended that such "modification" might have been. Thus, we believe that a court would give considerable deference to any interpretation which DEW might make.

As we understand it, the business community has been concerned regarding the rising rate of contributions to the Unemployment Trust Fund over the past several years. As a result of massive overpayments of unemployment benefits, the rates imposed upon businesses have been astronomically high. This being the case, the former Employment Security Commission was replaced by DEW. Numerous reforms were undertaken to rectify the overpayment abuses of the past. Thus, to ensure predictability for the businesses who must pay the tax, and are thus required to fund the Unemployment Compensation Trust Fund through those tax payments, we believe legislative action is necessary to clarify the meaning of § 41-31-5 and whether a "ten year look back" or a "three year look back" was intended by the General Assembly. In the meantime, it is up to DEW, as the administrative agency possessing the requisite expertise to administer the Unemployment Compensation System, to construe the statute, subject, of course, to judicial review and ultimately, legislative clarification. The courts will likely defer to DEW's construction in this instance because of the ambiguity of the statute.

Conclusion

To ensure predictability for businesses, who are required to fund the Unemployment Compensation Trust Fund through tax payments, we believe legislative action is necessary to clarify the meaning of § 41-31-5 and whether a "ten year look back" or a three year look back" was intended. We agree with you that there are two possible interpretations available. As you state, under one theory, § 41-31-5(a) [ten year look back] is controlling with respect to Tax Year 2014 because "the calculations will be done in 2013." Under the other theory, § 41-31-5(b) [three year look back] "would apply to any year from January 1, 2014 forward." Thus, the Legislature should clarify its intent in the use of such ambiguous language.

In the meantime, however, prior to any legislative clarification, DEW, as the agency possessing the necessary expertise, and charged with administration of the statute and the Unemployment Compensation System, possesses the requisite "discretion in the area of effectuating the policy established by the Legislature in the agency's governing law." *Op. S.C. Atty. Gen.*, August 9, 2013 (2013 WL 4497164). Courts defer to the administrative agency's interpretation so long as such construction is reasonable. Thus, it is up to DEW to interpret the

statute, in its judgment, as it deems best. We believe, in this instance particularly because of the ambiguity of § 41-31-5 and the uncertainty as to precisely what the General Assembly intended, a court will likely defer to the interpretation given this provision by DEW.

Sincerely,

Robert D. Cook
Solicitor General

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