



9352-9902

ALAN WILSON
ATTORNEY GENERAL

March 16, 2015

The Honorable Nikki G. Setzler
Senator, District 26
1101 Pendleton St # 510
Columbia, SC 29201

Dear Senator Setzler:

You have asked our advice as to the legally correct procedure for the appointment of certain magistrates who will soon be retiring. One or more of these magistrates desire to retire and then return to service as retirees, which state law now permits. The question you have is how this may be done without violating or circumventing state retirement laws or policies or IRS regulations. It is your desire to appoint one or more magistrates presently serving Lexington County after their term expires and who may retire, but you express concerns that if this is to be done, it be done legally and correctly.

Law/Analysis

S.C. Code Ann. Section 9-11-90 provides the relevant guidance under state law. Such provision is part of Chapter 11 of Title 9 dealing with the Police Officers Retirement System. Section 9-11-90 provides for a retired member to return to active employment following the member's meeting certain specified requirements. Specifically, for purposes here, § 9-11-90(4)(a)(1) provides in pertinent part that:

“[i]f a retired member of the system returns to employment covered by the South Carolina Police Officers Retirement System or any other system provided in this title sooner than thirty consecutive calendar days after retirement, the member's retirement allowance is suspended while the member retains employment by a participating employer of any of these systems. 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.”

It is our understanding that § 9-11-90's requirement that an individual be retired for at least “thirty consecutive calendar days” after retirement before being “restored to active service” is premised upon a regulation of the Internal Revenue Service requiring an individual to be truly separated from employment in order to begin receiving funds from a deferred compensation plan. Thus, it is clear that the separation from service must be genuine. Of course, each situation is fact specific and we are unable to determine facts in an opinion of this Office. See, e.g., Op. S.C. Att'y Gen., December 2, 1983.

Fortunately, with respect to the situation concerning appointment of magistrates following retirement, there is an existing Memorandum issued by Ms. Peggy Boykin, former director of the South Carolina Retirement System on June 17, 2010 to local government employees addressing this very situation. This Office, similarly to the courts, defers to the interpretation of the administrative agency having the requisite expertise in the administration of a statute. As we have noted frequently, "it 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. Att'y Gen., October 16, 2014, 2014 WL 5439609 (and numerous opinions cited therein). The Retirement Memorandum is enclosed, and provides as follows:

To: Local Government Employers
Members of the General Assembly of SC
From: Peggy Boykin
Date: June 17, 2010
Subject: Termination Requirement for Retirement Eligibility

The following information is provided in reference to a member's eligibility to retire under the South Carolina Retirement System (SCRS) and Police Office Retirement Systems (PORS) plans and subsequently return to work for an employer covered under the Retirement Systems.

An employer is required to certify the termination date to our office after which time the member's retirement application may be processed, provided the member meets all eligibility requirements for retirement. The employee must sever employment as an active member and terminate his or her employment relationship in order to retire. A member who is serving as an appointed official will typically be required to resign from his office in order to terminate the employment relationship with the covered employer and make the separation from service required for retirement. A member who has separated from service and been retired for at least 15 days may be hired or reappointed by a covered employer without affecting his or her benefit. For magistrates and other members who are appointed to their positions, the normal reappointment process would be required, including the requirement that the retired member meet the minimum qualifications for the position to which they are being appointed.

If a member fails to terminate employment and continues working without experiencing a true separation from service, he is not eligible to receive retirement benefits and should continue as an active contributing member.

If retirement benefits are paid in error as a result of an employer erroneously reporting a termination date to the Retirement Systems, the member must repay all benefits to which he was not entitled to receive. In accordance with Section 9-1-1670 of the SC Code of Laws, the Retirement Systems is required to recover the total amount of overpaid benefits.

The Honorable Nikki Setzler
Page 3
March 16, 2015

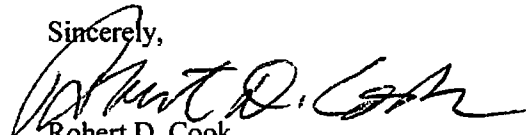
It is our strong suggestion that any process for appointment of a magistrate who has retired should follow this Memorandum to the letter, including meeting all qualification requirements, etc. While no state law interpretation or policy can ever guarantee that the IRS will not view the matter differently, the Retirement Systems Memorandum, although based upon an earlier version of § 9-11-90, remains sound, and provides the best assurance that all IRS policies and regulations have been met. This Memorandum very clearly specifies that there must be a “true separation from service” before any appointment of a magistrate may occur. For there to be a “true separation,” any appointment to the same position must occur subsequently to the retirement of the magistrate, or the magistrate who is retiring must be appointed to a different magisterial position than the one previously held. See Op. S.C. Att’y Gen., October 1, 1970 [“each [magistrate] position” is a separate office].

Of course, it is not the province of this Office to become enmeshed in the appointment process of magistrates. That is the domain of the Governor and the Senate. See Art. V. § 26 of the South Carolina Constitution. [“(t)he Governor, by and with advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law.]; § 22-1-10(A) [“(t)he Governor, by and with the advice and consent of the Senate, may appoint magistrates in each county of the State for a term of four years and until their successors are appointed and qualified.”]; Op. S.C. Att’y Gen., September 30, 1991, 1991 WL 633059 [“an incumbent magistrate is required to continue in office [or “hold over”] until his successor is appointed and qualified. Therefore, while a magistrate who reaches seventy-two years of age is required to retire, he is obligated to continue in office until his successor is appointed and qualifies.”]. A successor magistrate becomes qualified by taking the oath of office pursuant to § 22-1-20. See Op. S.C. Att’y Gen., May 14, 2014, 2014 WL 2591469 [an individual qualifies for office by taking the oath of office].

Conclusion

There must be a “true separation” from service or employment for a magistrate, who is retiring, to then be appointed to the magisterial position he or she previously held, or appointed (or “hired,” in the language of the Retirement Systems Memorandum) to a different magistrate’s position. To achieve this “true separation,” we strongly recommend that the Retirement System’s Memorandum of June 17, 2010, be followed to the letter. Of course, the usual appointment process for magistrates should determine compliance with this Memorandum, complete with the requirements set forth therein.

Sincerely,



Robert D. Cook
Solicitor General

Enclosure

cc: The Honorable Gary Reinhart, Chief Magistrate
Lexington County
Robert McCordy, Assistant Director,
Court Services

To: Local Government Employers
Members of the General Assembly of SC
From: Peggy Boykin
Date: June 17, 2010
Subject: Termination Requirement for Retirement Eligibility

The following information is provided in reference to a member's eligibility to retire under the South Carolina Retirement System (SCRS) and Police Office Retirement System (PORS) plans and subsequently return to work for an employer covered under the Retirement Systems.

An employer is required to certify the termination date to our office after which time the member's retirement application may be processed, provided the member meets all eligibility requirements for retirement. The employee must sever employment as an active member and terminate his or her employment relationship in order to retire. A member who is serving as an appointed official will typically be required to resign from his office in order to terminate the employment relationship with the covered employer and make the separation from service required for retirement. A member who has separated from service and been retired for at least 15 days may be hired or reappointed by a covered employer without affecting his or her benefit. For magistrates and other members who are appointed to their positions, the normal reappointment process would be required, including the requirement that the retired member meet the minimum qualifications for the position to which they are being appointed.

If a member fails to terminate employment and continues working without experiencing a true separation from service, he is not eligible to receive retirement benefits and should continue as an active contributing member.

If retirement benefits are paid in error as a result of an employer erroneously reporting a termination date to the Retirement Systems, the member must repay all benefits to which he was not entitled to receive. In accordance with Section 9-1-1670 of the SC Code of Laws, the Retirement Systems is required to recover the total amount of overpaid benefits.