1984 WL 249944 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 25, 1984

***1** The Honorable Alexander S. Macaulay
Member
South Carolina State Senate
Post Office Box 343
West Union, South Carolina 29696

Dear Senator Macaulay:
You have requested the opinion of this office as to whether the term 'full-time employees' in § 59-111-320 applies only to those who are employed by the institutions involved or whether it extends to any employees of any employer. This statute waives tuition for persons aged sixty or older but excludes persons and their spouses who 'receive compensation as full-time employees.' The statute does not define the term in question nor does its title provide other express guidance as to its meaning.

General rule of construction is that when doubt exists as to the extent of a proviso's construction, the proviso should be strictly construed. Sutherland Statutory Construction, Vol. 2A § 47.08 (4th Ed.) 'The reason for this is that the legislative purpose set forth in the main or dominant body of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.' Id. Under a strict construction of the instant proviso, the argument could be made that it applies to any employee of any employer because the proviso contains no express limitation on the scope of the employee exclusion (See also Sutherland, Vol. 2A § 46.01, et seq.); however, because such a broad exclusion of all employees would greatly limit the legislative policy expressed in the main body of § 59-111-320, a narrower reading of 'employee' might be more consistent with a strict construction of the proviso. Sutherland. In the construction of a statute, 'the intent of the Legislature must prevail.' State v. Salmon, 279 S.C. 344., 306 S.E.2d 620, 621 (1983). Although many different arguments can be made about the intent of the legislature in adopting the instant proviso, a reasonable construction of § 59-111-320 indicates that the legislature may have intended only to exclude employees of the institutions affected and the spouses of those employees.

Originally the instant proviso was not included in § 59-111-320 and sixty-five was the age of eligibility for the tuition waiver. A purpose behind the addition of this proviso in 1978 may be related to the lowering of the age of eligibility to sixty in that same act. Act 503, Acts and Joint Resolutions of South Carolina, 1978. Because many persons at age sixty or older may not be retired, the proviso must have been intended to deal with at least some of the many working individuals who would be brought into the scope of the law by the lowering of the age. See e.g. § 9-1-1530 of the Code, as amended.

Although the term 'employee' has different meanings according to its usage, many individuals who receive compensation for work performed are not subject to another's control or right of control so as to make them 'employees'. See Anderson v. West, 270 S.C. 184, 241 S.E.2d 551 (1978), Hollingbery v. Dunn, 68 Wash.2d 75, 411 P.2d 431 (1966); 53 Am.Jur.2d Master and Servant, §§ 1-5. Therefore, if the proviso extended to any employee of any employer, it still would not exclude many other persons who are compensated for their work or who receive unearned income. [1] Instead, limiting 'employees' to institutional employees could have the purpose of allowing the State's colleges and universities to make their own decisions about how to treat their employees and the spouses of those employees for tuition and fee purposes. See e.g. §§ 59-112-20 E, 59-117-40(a) and 59-123-60. A somewhat analogous provision in § 59-112-60 exempts employees of state institutions and their spouses and children from in-state residency requirements. Moreover, the term 'employee' seems to contemplate the existence of a particular employer such as the colleges and universities. See e.g. §§ 8-13-20, 8-17-320, 8-17-370 and 9-1-10 of the Code. The repeated

references to colleges, universities and institutions in § 59-111-320, including in another proviso immediately preceding the one in question, indicates that those entities were the only employers contemplated by the legislature. Thus, a strong argument can be made that the proviso was intended to include only institutional employees. Sutherland, Vol. 2A § 45.12.

***2** In conclusion, while we believe that a reasonable interpretation of the proviso in question is that it is limited to the employees of the employing institutions, sound arguments can be made for a different conclusion. Therefore, clarification by a declaratory judgment action or legislative action may be desirable here.

If we may be of further assistance, please let us know.
Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

Footnotes

1 In addition, the exclusion of spouses of employees from the benefits of the tuition would appear to be highly speculative if based on the assumption that they would have the ability to pay for tuition; however, the argument could be made that the legislature was merely making a reasonable attempt to exclude non-retired individuals and their spouses from a statute aimed primarily at retirees. See Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979). '. . . [A] state does not violate the equal protection clause merely because the classifications made by its laws are imperfect.' Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1154, 25 L.E.2d 491 (1970). The argument that the statute is aimed at non-retirees who are able to pay may also be supported by limitations in the proviso to employees who 'receive compensation.'

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