1983 WL 182063 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 22, 1983

***1** Jack S. Mullins, Ph.D.
Director
State Personnel Division
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Dr. Mullins:
This is in response to your letter of July 8, 1983, wherein you have requested the opinion of this office concerning the following questions:
1. Can a seventy-year-old or older person not currently a public employee in South Carolina be hired as a full- or part-time employee into either a permanent or temporary position? If so what restrictions apply?

2. Can such an individual be hired on a special contractual services basis? If so, what restrictions apply?

3. What restrictions apply to the use of such individuals as independent contractors?

4. What restrictions apply to the hiring of persons who have retired under the State Retirement System?

We will answer your questions in the order asked.

1. A person age seventy or older who is not currently an employee of the State of South Carolina cannot be employed as a full- or part-time employee to fill either a temporary or permanent position. Section 9-1-1530, CODE OF LAWS OF SOUTH CAROLINA, 1976 (hereafter 'CODE') as amended, provides that 'any employee or teacher in service who has attained the age of seventy years shall be retired forthwith . . ..' [1] Obviously, if current employees are to be retired at age seventy, no person may lawfully be hired as a public employee if, at the time of hire, he or she exceeds this mandatory retirement age. This conclusion is supported by § 9-1-1790 of the CODE, as amended, which provides, in pertinent part:
Any retired member of the [Retirement] System may return to employment covered by the System and earn up to six thousand dollars per fiscal year without affecting the monthly retirement allowance he is receiving from the System; . . .. * * * Provided, further, the provisions of this section shall not apply to any employee or member of the System who has mandatorily retired because of age pursuant [to] § 9-1-1530. (emphasis added.)

Although neither § 9-1-1530 nor § 9-1-1790 expressly prohibit the hiring of persons seventy-years-old and older, such a prohibition is clearly implied in those two provisions, and our Supreme Court has said that, in construing statutes, 'that which is clearly implied is as good as if expressed.' State v. Columbia Railway, Gas and Electric Co., 112 S.C. 528, 538, 100 S.E. 355 (1919); accord, Gaffney v. Mallory, et al., 186 S.C. 337, 346, 195 S.E. 840 (1937). Therefore, persons age seventy and over may not lawfully be employed to fill permanent or temporary positions in either full-time or part-time capacities. Such persons may, however, serve as government volunteers pursuant to the Government Volunteers Act, § 8-25-10, et seq., CODE, as amended.

2. Just as one age seventy or over may not lawfully he hired as a full or part-time public employee, regardless of whether the position being filled is permanent or temporary, such a person may not be hired as a special contract employee. A special

contract employee is an employee within the meaning of § 9-1-10(4), CODE OF LAWS OF SOUTH CAROLINA, 1976, [2] and for that reason, is subject to the mandatory retirement provisions of § 9-1-1530. 1982 Unpub. Op. Atty'. Gen. from Assistant Attorney General James M. Holly to Joseph C. Griffith (copy attached). Since § 9-1-1530 clearly implies that persons age seventy and over may not lawfully be employed by public employers within South Carolina, persons in this age range may not lawfully be hired as special contract employees.

***2** The question whether persons age seventy and over may be hired by a public employer as consultants pursuant to the provisions of § 9-1-1600, CODE [3] is more difficult, however. This office has twice previously concluded that this provision authorizes persons past the age of mandatory retirement to the retained in a consultative capacity. See, Op. Atty. Gen., September 12, 1980; 1972 Op. Atty. Gen., No. 3351, p. 192.

Based upon these opinions, it appears the General Assembly intended, in enacting § 9-1-1600, to allow employees who have retired pursuant to § 9-1-1530 (including those mandatorily retired) again to be 'temporarily employed . . . in a consultative capacity . . .' without such consultative work 'affecting, reducing or canceling' retirement benefits. This conclusion is further supported by the fact that § 9-1-1600 speaks of 'employees' performing temporary consultant work, while § 9-1-1530 addresses 'employees in service.' In comparing the two provisions and reading them together, it would thus appear the Legislature anticipated the consultative work addressed in § 9-1-1600 occurring only after retirement, including mandatory retirement. Therefore, while the matter is not free from doubt, see, Op. Atty. Gen., April 9, 1981, we would advise that, so long as the work is truly consultative in nature and not a return to 'employment' under another name, persons may be retained as consultants past the age of seventy-two. [4] Because this question is not free from doubt, legislative or judicial clarification may be advisable.

3. Since § 9-1-1530, the source of the prohibition on hiring persons age seventy and over, applies only to employees as defined in § 9-1-10(4), that section would not prohibit a public employer from engaging the services of an independent contractor whose age is seventy or more because independent contractors do not fall within the statutory definition of 'employee.' Of course, a public employer cannot circumvent the age limitation on hiring employees by simply designating a new hire an independent contractor. The label affixed by the employer is not controlling on the question of whether one is an employee or an independent contractor. What is controlling is whether the employer has 'the right and authority to control and direct the particular work or undertaking, as to the manner and means of its accomplishment.' Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797 (1969). If the employer has the right and authority to control not only the end result of the undertaking or work of another but also the manner and means by which that end result is accomplished, the person performing the work or undertaking is an employee, note an independent contractor. Id., 252 S.C. at 189-190; accord, Anderson v. West, 270 S.C. 547, 550, 131 S.E.2d 551 (1978); South Carolina Industrial Commission v. Progressive Life Insurance Co., 242 S.C. 547, 550, 131 S.E.2d 694 (1963). And this is so notwithstanding that the employer does not exercise his right to control the performance of the work. Anderson v. West, 270 S.C. at 187; Young v. Warr, supra, 252 S.C. at 189-190. [5] As the South Carolina Supreme Court succinctly put it in Young v. Warr, supra:

***3** 'An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work[,]' . . . and 'where one who performs work for another represents the will of that other, not only as to the result, but also as to the means by which the result is accomplished, he is not an independent contractor but an [employee] and the relationship is one of [employer-employee] when the employer reserves control and an interest in the performance of the work other than the finished product.'

252 S.C. 189-190 (internal citations omitted). [6]

4. Persons under the age of seventy who have previously retired from state service and are drawing a retirement allowance from the State Retirement System may be employed by public employers to fill any position for which they qualify. However, such persons should be made aware of § 9-1-1790 of the CODE, as amended, which provides, in relevant part:

Any retired member of the [Retirement] System may return to employment covered by the System and earn up to six thousand dollars per fiscal year, without affecting the monthly retirement allowance he is receiving from the System; provided, if such retired member continues in service after having earned six thousand dollars in a fiscal year, his retirement allowance shall be discontinued during his period of service in the remainder of such fiscal year. If such employment continues for at least forty-eight consecutive months the provisions of § 9-1-1590 [discontinuing retirement allowance and requiring employee to become contributing member of System again if annual compensation is equal to or greater than 75% of his average final compensation at retirement] shall apply. * * *

If the retiree is retained as a consultant pursuant to § 9-1-1600 (see footnote 3, supra), his retirement benefits will not be affected at all provided that his consultative work does not exceed four months in any one year. [7]

Of course, a retiree age seventy or over would not be eligible to be hired as a state employee because he would be past the mandatory retirement age. His status as a retiree would put him on no different footing—insofar as eligibility for state employment is concerned—than any other person age seventy or over. Like any other person age seventy, however, a retiree could lawfully be engaged as an independent contractor or consultant. Such a person could also serve as a government volunteer.

I trust that this information satisfactorily addresses your questions.
Sincerely,

Vance J. Bettis
Assistant Attorney General

Footnotes

1 Certain exceptions to this provision make it possible for an employee to be continued in service until the end of the fiscal year in which the employee attains his seventy-second birthday.

2 Section 9-1-10(4) defines 'employee' as follows:
'Employee' shall mean (a) to the extent he is compensated by the State, any employee, agent or officer of the State or any of its departments, bureaus and institutions, other than the public schools, whether such employee is elected, appointed or employed, (b) the president, any dean, professor or teacher or any other person employed in any college, university or educational institution of higher learning supported by and under the control of the State, (c) any agent or officer of any county, municipality or school district, or of any agency or department thereof, which shall have been admitted to the System under the provisions of § 9-1-470, to the extent he is compensated for services from public funds, (d) any employee of the extension service and any other employee a part of whose salary or wage is paid by the Federal Government if the Federal funds from which such salary or wage is paid shall before disbursement be and become State funds and (e) any employee of any service organization, the membership of which is composed solely of persons eligible to the teachers or employees as defined by this section, if the compensation received by the employees of such service organizations shall be provided from moneys paid by the members as dues or otherwise or from funds derived from public sources and if the employee contributions prescribed by this Title shall be paid from the funds of the service organization; the word 'employee' shall not include Supreme and Circuit Court Judges[.] Regulation 19-707.03A(2)d. of the State Personnel Division's regulations (Vol. 23, Chapter 19, CODE, at p. 73) relating to the status of a special contract employee, the Guidelines of the State Personnel Division concerning special contract employees and the contract of employment used by agencies to engage the services of special contract employees leave no doubt that a special contract employee is, in fact, an employee and not an independent contractor. See infra, pp. 5-7, for a discussion of the distinction between an employee and an independent contractor. As special contract employees are not independent contractors, they are necessarily employees within the meaning of § 9-1-10(4).

3 Section 9-1-1600 provides:
Any teacher or employee especially skilled in scientific knowledge and attainment may be temporarily employed by any part of the government or any agency thereof in a consultative capacity on a per diem compensation without such temporary consultative employment in any way affecting, reducing or canceling his retirement benefits but such temporary consultative employment shall not exceed four months in any one year.

4 A consultant normally renders advice and provides expertise, 16A C.J.S., 'Consult', and is, in essence, an independent contractor, while an employee is under the direction and control of his employer. See, Carter's Dependents v. Palmetto State Life Insurance Co., 209 S.C. 67, 38 S.E.2d 905 (1946).

5 Some of the more important factors in determining whether the employer has a right of control, apart from direct evidence (such as language in an employment contract providing that the work will be performed subject to the direction or in accordance with the instructions of the employer), include the method of payment, the furnishing of equipment, and the right to fire. South Carolina Industrial Commission v. Progressive Life Insurance Co., supra, 242 S.C. at 550 citing 1 Larson's Workmen's Compensation Law, § 44.00. According to Professor Larson, '[p]ayment by unit of time, such as an hour, day, or week, is strong evidence of employment status.' 1C Larson's Workmen's Compensation Law, § 44.33 at 8-74 (1982). On the other hand, '[p]ayment of a fixed sum for a completed job is characteristic of independent contractorship, but not conclusive.' Id., § 44.33(c) at 8-93. 'Payment on a piece-work or commission basis' writes Professor Larson, 'is consistent with either status.' Id. at 8-73. If the employer furnishes valuable equipment for performing a job, the relationship created is almost always considered to be employer-employee. Conversely, the worker's furnishing of such equipment tends to indicate that the worker is an independent contractor, especially when other factors such as method of payment point toward that relationship. Id., § 44.34. Finally, if the employer retains the unqualified right to fire a worker (to be distinguished from the right to terminate the contract for bona fide reasons of dissatisfaction), the worker will likely be considered an employee, not an independent contractor for, generally speaking, '[t]he power to fire . . . is the power to control.' Id., § 44.35 at 8-116. The right-to-fire test, standing alone, however, is not conclusive; rather, it should be considered in connection with all the previously mentioned factors to determine whether the employer has the right to control not only the final result but also the manner and means of achieving that result. Id., at 8-129-8-134. Moreover, just as the right to fire generally equates with the right to control, the absence of the right to fire strongly indicates that the employer is not free to control the details of a worker's performance. Id., at 8-134.

6 Generally speaking, the provisions of the South Carolina Consolidated Procurement Code, § 11-35-10, et seq., CODE, as amended, are applicable to the procurement of the services of an independent contractor but are not applicable to the procurement of the services of an employee, including a special contract employee. See Regulation 19-445.2025. The Code and its implementing regulations should be consulted to determine whether the Code applies to the procurement of particular services.

7 We allude to these statutes solely because a retiree returning to state service would presumably want to be aware of what impact his returning to service would have on his retirement benefits. As stated in the text, however, a retiree under the age of seventy is eligible for employment for any position for which he qualifies.

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