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Honorable James K. Lyons
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Alabama State Port Authority – Retirement – Creditable Service – Creditable Coverage – State Docks – Insurance

In calculating years of creditable coverage for employees of the Alabama State Port Authority retiring after December 31, 2011, the State Employees' Insurance Board should apply credit for years and months of nonmerit employment with the Alabama State Port Authority, regardless of whether the employee was covered by the State Employees' Health Insurance Plan.

Dear Mr. Lyons:

This opinion of the Attorney General is issued in response to your request.

QUESTION

For purposes of calculating retiree health insurance premiums for employees of the Alabama State Port Authority retiring after December 31, 2011, should the State Employees' Insurance Board include years of creditable service with the Alabama State Port Authority as nonmerit employees, regardless of whether the

> employee was covered under the State Employees' Health Insurance Plan?

FACTS AND ANALYSIS

Several employees of the Alabama State Port Authority retiring after December 31, 2011, have been informed by the State Employees' Insurance Board ("SEIB") that, for purposes of calculating retiree premiums, prior years of service during which the employee did not participate in the State Employees' Health Insurance Plan ("Plan") would not be recognized. Significantly, it should be noted that, prior to 1996, many employees of the State Port Authority did not participate in the Plan. In fact, no nonmerit employee of the Port Authority participated in the Plan.

Section 36-29-1, *et seq.*, of the Code of Alabama provides for the administration of the Plan. As provided therein, "[SEIB] shall set forth the employer contribution to the health insurance premium for each retiree class." ALA. CODE § 36-29-19.7 (Supp. 2012).

Chapter 29 of title 36 of the Code, dealing with the State Employees' Health Insurance Plan, has been the subject of interpretation and modification in recent years. In 2007, this Office opined that the SEIB determines the employer's contribution to the retirees' health insurance premiums based partly on the retirees' years of service, but also concluded that the Retirement Systems of Alabama was responsible for determining years of creditable service based upon the definition of "years of service" appearing in section 36-29-1(16) of the Code. Opinion to Honorable James K. Lyons, Director, Alabama State Port Authority, dated July 24, 2007, A.G. No. 2007-115.

In 2008, the Legislature adopted Act 2008-280 for the stated purpose of "revis[ing] the definition of 'years of service' so as to authorize the State Employees' Insurance Board to determine the years of creditable service for such periods of time that an employee of the Alabama State Port Authority was employed as a non-Merit System employee." 2008 Ala. Acts 2008-280, 542. The act also amended the definition of "years of service" to state, in pertinent part, the following:

> For employees of the Alabama State Port Authority, the term years of service shall mean the sum of the number of years and months of

> creditable service as determined by the Employees' Retirement System, the Teachers' Retirement System, or the Judicial Retirement System with regard to any periods of time during which such employee was employed under the Merit System ***plus the number of years and months of creditable service as determined by the State Employees' Insurance Board with regard to any period of time during which such employee was employed by the Alabama State Port Authority as a non-Merit employee.***

Id. at 545-46 (emphasis added). According to your request, the SEIB interpreted this language to allow retiring employees of the Port Authority credit for all years of creditable service regardless of participation in the Plan.

In 2011, the Legislature adopted Act 2011-698. Therein, the Legislature amended section 36-29-19.7 of the Code to read as follows:

> Except . . . for [retirees on disability], for employees who retire after December 31, 2011, the employer contribution to the health insurance premium set forth by the board for each retiree class shall be reduced by four percent for each ***year of creditable coverage*** less than 25 and increased by two percent for each year of creditable coverage over 25, subject to adjustment by the board for changes in Medicare premium costs required to be paid by a retiree. In no case shall the employer contribution of the health insurance premium exceed 100 percent of the total health insurance premium cost for the retiree.

2011 Ala. Acts No. 2011-698 (emphasis added). Notably, the amendment changed the characteristic of prior employment necessary for credit recognition from "year[s] of service" to "years of creditable coverage."

Act 2011-698 also defined the new term "years of creditable coverage" as follows:

The number of years and months that an employee is covered under the State Employees' Health Insurance Plan prior to retirement as determined by the State Employees' Insurance Board, including any periods of full-time permanent employment subsequent to retirement up to a maximum of five years. Creditable coverage shall also include months and years: (1) Related to service in the United States Armed Forces; (2) as a part-time employee prior to October 1, 2005; (3) as an employee as defined in Sections 16-25A-1 and 16-25A-11; (4) as a full time employee of a local legislative delegation office which participates in the Employees' Retirement System if the employee is under the state employees' insurance plan on June 14, 2011; (5) as an employee of a postsecondary institution eligible for Public Education Employees' Health Insurance Plan coverage as a retiree whether the institution participates in the Public Education Employees' Health Insurance Plan or has its own plan of insurance for active employees, provided the postsecondary institution contributes an amount to the State Employees Insurance Fund for each of its retired employees equal to any amount appropriated by the state to fund benefits for retired employees as determined by the State Employees' Insurance Board; (6) as a juvenile probation officer provided that the Administrative Office of Courts contributes an amount to the State Employees Insurance Fund for each retired juvenile probation officer equal to any amount appropriated by the state to fund benefits for retired employees as determined by the State Employees' Insurance Board; or (7) as an employee of the USS Alabama Battleship Commission provided that the USS Alabama Battleship Commission contributes an amount to the State Employees Insurance Fund for each retired employee of the USS Alabama Battleship Commission equal to any amount appropriated by the state to fund benefits for retired employees as

> determined by the State Employees' Insurance Board. ***For employees of the Alabama State Port Authority, the term years of creditable coverage shall mean the sum of the number of years and months of creditable service as determined by the Employees' Retirement System, the Teachers' Retirement System, or the Judicial Retirement System with regard to any periods of time during which such employee was employed under the Merit System plus the number of years and months of creditable service as determined by the State Employees' Insurance Board with regard to any period of time during which such employee was employed by the Alabama State Port Authority as a non-Merit System employee.***

ALA. CODE § 36-29-1(16) (Supp. 2012) (emphasis added).

The current definition of "creditable coverage" for employees of the Alabama State Port Authority is identical to the definition of "years of service" for Port Authority employees as previously defined in Act 2008-280. Nonetheless, in May 2012, SEIB advised the Port Authority that employees who had retired since December 31, 2011, would not be allowed years of creditable service for years of employment in which the employee did not participate in the Plan. This new interpretation of identical language resulted in a decrease of the employer contributions toward premiums and a corresponding increase of the employee contributions to be paid by the affected retirees.

Specific provisions relating to specific subjects are understood as exceptions to general provisions relating to general subjects. Specific provisions relating to specific subjects control general provisions relating to general subjects. *Ex parte Jones Mfg. Co., Inc.*, 589 So. 2d 208, 211 (Ala. 1991); *Murphy v. City of Mobile*, 504 So. 2d 243, 244 (Ala. 1987); *Herring v. Griffin*, 211 Ala. 225, 226, 100 So. 202, 203 (1924). Provisions are to be construed together "in favor of each other to form one harmonious plan and give uniformity to the law," if it is possible to do so. *Ex parte Coffee County Comm'n*, 583 So. 2d 985, 988 (Ala. 1991).

The Legislature, by Act 2011-698, created a general definition of "years of creditable coverage" that requires "cover[age] under the State Employees' Health Insurance Plan" for recognition in the retiree premium

calculation. ALA. CODE § 36-29-1(16) (Supp. 2012). Also included therein, however, is a specific definition for "years of creditable coverage" as it relates to employees of the Alabama State Port Authority. There, the Legislature directed that "years of creditable coverage shall mean the sum of years and months of creditable service . . . under the Merit System plus the number of ***years and months of creditable service as determined by the State Employees' Insurance Board [for] time . . . employed by the Alabama State Port Authority as a non-Merit System Employee***." *Id.* (emphasis added).

Unlike the general definition of creditable coverage, the definition of creditable coverage specifically applicable to employees of the Port Authority imposes no requirement of coverage by the Plan. Moreover, the definition is identical to the former definition of "years of service" interpreted by the SEIB as granting creditable service to employees of the Port Authority for years of nonmerit service. Therefore, the calculation of creditable coverage for employees of the Port Authority should be based on years of creditable service, regardless of coverage by the Plan.

The SEIB argues that the clear intent of Act 2011-698 was to require that, for purposes of retiree insurance premiums, no employee retiring after December 31, 2011, would be credited for years in which the employee did not participate in the Plan. Additionally, SEIB argues that the statutory language "as determined by the State Employees' Insurance Board" confers discretionary authority upon the SEIB to determine the amount of creditable service of nonmerit Port Authority employees that will be deemed as creditable coverage.

If there is uncertainty about legislative intent in the enactment of a statute, courts may look to the preamble of the act to determine legislative intent. *City of Bessemer v. McClain*, 957 So. 2d 1061, 1076 (Ala. 2006). The preamble to Act 2011-698 provides, in part, that the purpose of the act is "to provide that all employees retiring after December 31, 2011, ***with certain exceptions***, be subject to a sliding scale premium calculation based on years of creditable coverage in the State Employees' Health Insurance Plan." 2011 Ala. Acts 2011-698 (emphasis added). In accordance with its stated intent, the Legislature, by the plain wording of the statute, granted creditable coverage to numerous groups, including service men and women; education employees; legislative delegation office employees; post secondary institution employees; and juvenile probation officers, regardless of participation in the Plan. *Id.*

The act also specifically mandated that, for employees of the Port Authority, creditable coverage is the sum of (1) time of creditable service as a merit system employee as determined by ERS, TRS, or JRS, as appropriate, and (2) time of creditable service as a nonmerit employee of the Port Authority. *Id.* Therefore, the act clearly reiterates the exception for employees of the Port Authority from the general definition and requires SEIB to grant years of creditable coverage to employees of the Port Authority for years of creditable service, regardless of participation in the Plan.

SEIB also contends that the phrase "as determined by the State Employees' Insurance Board" vests the SEIB with the discretion to decide how much creditable service to grant nonmerit Port Authority employees. The authority, however, to make a determination and the power to exercise discretion are not the same thing. A "determination" is "a final decision by a court or administrative agency." BLACK'S LAW DICTIONARY 514 (9th ed. 2009). "Discretion," on the other hand, is defined as "[a] public official's power or right to act in certain circumstances according to personal judgment and conscience, often in an official or representative capacity." BLACK'S at 534. Perhaps more relevant, "administrative discretion" is defined as "[a] public official's or agency's ***power to exercise judgment*** in the discharge of its duties." *Id.* (emphasis added).

Accordingly, under the terms of the statute, SEIB merely calculates creditable service for nonmerit employees of the Port Authority. SEIB is not, however, allowed the discretion to allow, or disallow, creditable service. Put another way, if the nonmerit Port Authority employee has creditable service, he or she, by statutory mandate, is also entitled to commensurate creditable coverage regardless of participation in the plan.

"Creditable service" is not defined in the statute. SEIB contends that creditable service is defined in section 36-29-1(17) of the Code. This definition, however, defines "years of service." Nonetheless, this section, which uses identical language as that appearing in section 36-29-1(16), authorizes SEIB to determine "***creditable service*** [for] any period of time during which such employee was employed by the Alabama State Port Authority as a non-Merit System employee." ALA. CODE § 36-29-1(17) (Supp. 2012) (emphasis added).

Although not defined in section 36-29-1 of the Code, "creditable service" is a term both defined and used frequently in other provisions of the Code in the context of service credit with the various public employee retirement plans. *See, e.g.*, ALA. CODE § 16-25-1 (Supp. 2012) (teachers'

retirement plan); ALA. CODE § 36-27-1 (Supp. 2012) (employees retirement system). The legislature is presumed to know the meaning of statutorily defined terms and judicial construction of those terms. *Ex parte Pierce*, 50 So. 3d 447, 454 (Ala. Civ. App. 2010); *Madison County Bd. of Educ. v. Wilson*, 984 So. 2d 1153, 1159-60 (Ala. Civ. App. 2006), *aff'd Ex parte Wilson*, 984 So. 2d 1161 (Ala. 2007).

Additionally, "creditable service" for merit employees of the Port Authority, pursuant to the statute, is determined by ERS, JRS, or TRS, as appropriate. Clearly, in those instances, "creditable service" is referring to retirement service credit. The term "creditable service" should be given the same meaning throughout the statute. *Ex parte Jackson*, 625 So. 2d 425, 428 (Ala. 1992) ("where a clause or phrase relating to the 'same object or subject matter' is repeated throughout an act, such clause or phrase should receive a consistent construction throughout the act"); *House v. Cullman County*, 593 So. 2d 69, 72 (Ala. 1992) ("[a] phrase that is used repeatedly in statutory provisions relating to the same object or subject matter shall 'be interpreted to have the same meaning' throughout"); 2A Singer, *Statutes and Statutory Construction*, § 46:6 (7th ed. 2007) ("[t]he same words used twice in the same act are presumed to have the same meaning").

Had the Legislature intended to disallow credit to nonmerit employees of the Port Authority who did not participate in the Plan, it could have so stated or simply used the term "creditable coverage" rather than "creditable service." Instead, the Legislature used the term "creditable service."

Finally, "[t]he Legislature will not be presumed to have done a futile thing in enacting a statute . . . ." *Alabama Dep't of Indus. Relations v. AHI Linden Lumber, LLC*, 68 So. 3d 187, 193 (Ala. Civ. App. 2011), *citing Ex parte Watley*, 708 So. 2d 890 (Ala. 1997) & *Ex parte Meeks*, 682 So. 2d 423 (Ala. 1996). The Port Authority informs this Office that all merit system employees of the Port Authority participate in the Plan and that all nonmerit employees are not included in the Plan. Therefore, "non-merit employment with the Port Authority" and "not participating in the Plan" effectively describe the same groups of employees. If, as SEIB suggests, the only relevant inquiry is whether the employee participated in the Plan, then the calculation of creditable coverage for employees of the Port Authority could be accomplished pursuant to the general definition of creditable coverage appearing in the first sentence of section 36-29-1(16).

The specific exception carved out for employees of the Port Authority, according to the interpretation of SEIB, would be meaningless. Therefore, it is the opinion of this Office that the Legislature intended that SEIB recognize creditable service of nonmerit system employees of the Port Authority regardless of participation in the Plan when determining creditable coverage of employees of the Port Authority.

Accordingly, SEIB is required to recognize years of creditable service, regardless of coverage by the Plan, for time as a nonmerit employee with the Port Authority when calculating years of creditable coverage.

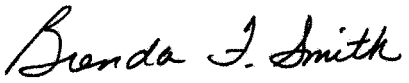
CONCLUSION

In calculating years of creditable coverage for employees of the Alabama State Port Authority retiring after December 31, 2011, the State Employees' Insurance Board should apply credit for years and months of nonmerit employment with the Alabama State Port Authority, regardless of whether the employee was covered by the State Employees' Health Insurance Plan.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ben Baxley of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:



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