STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Mary S. Anderson, Petitioner, vs. South Carolina Budget and Control Board, South Carolina Retirement Systems, Respondent.	)	Docket No. 06-ALJ-30-0008-CC **INTERLOCUTORY EN BANC ORDER**

APPEARANCES: Robert E. Hoskins, Esquire, for Petitioner
Kelly H. Rainsford, Esquire, for Respondent

MCLEOD, J.: This matter is before the Administrative Law Court (Court) pursuant to a Request for Consideration En Banc filed on February 22, 2006, by the South Carolina Budget and Control Board, South Carolina Retirement Systems (Board). By Order dated March 31, 2006, the Court granted the request to hear the case en banc pursuant to ALC Rule 70, to determine the construction of the words "in service" in S.C. Code Ann. § 9-1-1540 (2005). Following the submission of briefs and stipulations by the parties, the Court held an en banc hearing on June 26, 2006, at which the parties presented oral arguments.

The Board contends that because it received Petitioner's application nearly six months after she was terminated from her position with the Medical University Hospital Authority, she was not "in service" when her application was received and therefore should be denied disability retirement benefits. The Petitioner argues that as a member of the South Carolina Retirement Systems she is entitled to have her application for disability retirement benefits considered despite the fact that the application was received by SCRS after her employment with a qualifying employer terminated, so long as her disability began while she was "in service."[1] Under Petitioner's construction of "in service," a former employee would have no time limit on

[1] In what may be termed an informal rule, the Board has adopted a procedure which treats an applicant as still "in service" for ninety (90) days after service has ceased, and considers a member eligible for disability retirement benefits if an application is filed within that ninety-day period.

the filing of a claim for disability benefits, no matter how long it was filed after his or her contract of employment had terminated.

LAW/ANALYSIS

Background

The Retirement Systems makes determinations of eligibility for disability retirement benefits for the members of three separate retirement systems: SCRS, PORS, and GARS.[2] The "in service" application requirement is contained in the disability statutes for all three systems.

South Carolina Retirement System ("SCRS")

In 1945, the General Assembly created a retirement system for teachers, state employees, and county and municipal employees. Act No. 157, 1945 S.C. Acts 212. This is the retirement system referred to as the South Carolina Retirement System ("SCRS"). Act No. 157 §§ 1(1) & 2. As part of that creation, the General Assembly provided disability retirement benefits for members of SCRS. The statute created pursuant to Act No. 157, provided in pertinent part:

> Upon the application of a member in service or of his employer, any member who has had ten or more years of creditable service may be retired by the Retirement Board, not less than thirty and not more than ninety days next following the date of filing such application, on a disability retirement allowance: PROVIDED, That the Medical Board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member should be retired.

Act No. 157 § 5(3) (emphasis added). Since the initial creation of the retirement system and, in particular, the provision for disability retirement benefits, the General Assembly has amended the disability statute several times.

In 1970, the General Assembly substantively amended the statute to provide "Upon the application of a member in service or of his employer, any member in service on or after July 1, 1970. . . ." Act No. 869 § 2, 1970 S.C. Acts 1939 (emphasis added). The General Assembly, therefore, emphasized the "in service" requirement by restating that "any member in service" and meeting the other requirements of the statute may be retired on disability. In 1985, the General

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[2] Although the Retirement Systems is responsible for paying disability retirement benefits for Judges and Solicitors Retirement System (JSRS) members, the disability statute for JSRS provides for the South Carolina Supreme Court to make the determination of whether a member of that system meets the disability requirements. See S.C. Code Ann. § 9-8-60(3) (1986 & Supp. 2005). As a result, the Retirement Systems only makes determinations of disability for SCRS, PORS, and GARS. S.C. Code Ann. § 9-1-1540; § 9-9-65(1); § 9-11-80(1).

Assembly amended the disability eligibility requirements by adding "or any contributing member who is disabled as a result of an injury arising out of and in the course of the performance of his duties regardless of length of membership on or after July 1, 1985." 1985 Act No. 74 § 1. The current version of the SCRS disability statute provides, in pertinent part:

> Upon the application of a member in service or of his employer, a member in service on or after July 1, 1970, who has had five or more years of earned service or a contributing member who is disabled as a result of an injury arising out of and in the course of the performance of his duties regardless of length of membership on or after July 1, 1985, may be retired by the board not less than thirty days and not more than nine months next following the date of filing the application on a disability retirement allowance if the system, after a medical examination of the member, certifies that the member is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired.

S.C. Code Ann. § 9-1-1540 (1986 & Supp. 2005) (emphasis added). Since 1945, the General Assembly has made numerous changes, both substantive and grammatical in nature, to the SCRS disability statute. During those sixty years, however, the General Assembly has not altered or amended the first requirement set forth in the SCRS disability statute that provides for an application to be filed while a member is "in service."

South Carolina Police Officers Retirement System ("PORS")

In 1962, the General Assembly created a retirement system for police officers. Act No. 799, 1962 S.C. Acts 1933. This is the retirement system referred to as the South Carolina Police Officers Retirement System ("PORS"). Act No. 799 §§ 1(1) & 2. Similar to the creation of SCRS, the General Assembly also provided disability retirement benefits for members of PORS. The statute created pursuant to Act No. 799 provided in pertinent part:

> Upon the application of a member in service or of his employer, any member who has five or more completed years of creditable service may be retired by the retirement board not less than thirty days and not more than ninety days next following the date of filing such application on a disability retirement allowance if the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent and that such member should be retired.

Act No. 799 § 8(1) (emphasis added). In 1974, the General Assembly repealed Act No. 799 and replaced it with Act No. 937, 1974 S.C. Acts 2032. The disability statute created pursuant to Act No. 937, however, was identical to the disability statute created by Act No. 799 except the

General Assembly replaced "creditable service" with "credited service." Act No. 937, § 61-338(1).

In 1980, the General Assembly amended the disability eligibility requirements by adding "or any contributing member who is disabled as a result of an injury arising out of and in the course of the performance of his duties regardless of length of membership." 1980 Act No. 408 § 1. The current version of the disability statute for PORS provides, in pertinent part:

> On the application of a member in service or the member's employer, a member who has five or more completed years of earned service or any contributing member who is disabled as a result of an injury arising out of and in the course of the performance of the member's duties regardless of length of membership may be retired by the retirement board not less than thirty days and not more than nine months next following the date of filing the application on a disability retirement allowance if the system, after a medical examination of the member, certifies that the member is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired.

S.C. Code Ann. § 9-11-80(1) (1986 & Supp. 2005) (emphasis added). Since 1962, the General Assembly has made numerous changes, both substantive and grammatical in nature, to the PORS disability statute. During those forty-four years, however, the General Assembly has not substantively amended the first requirement set forth in the PORS disability statute that provides for an application to be filed while a member is "in service."

Retirement System for Members of the General Assembly ("GARS")

In 1966, the General Assembly created a retirement system for members of the General Assembly. Act No. 800, 1966 S.C. Acts 2081. This is the retirement system referred to as the Retirement System for Members of the General Assembly ("GARS"). Act No. 800 §§ 1(1) & 2. Unlike SCRS and PORS, the General Assembly did not provide disability retirement benefits for members of GARS during the initial creation of the system. The General Assembly did not provide disability retirement benefits for members of GARS until 1977. 1977 Act No. 44. In 1977, the General Assembly created a disability statute for GARS, which provided in pertinent part:

> Upon the application of a member in service or of the State, any member in service on or after July 1, 1977, who has five or more years of credited service may be retired by the board not less than thirty days nor more than ninety days next following the date of filing the application on a disability retirement allowance if the medical board, after a medical examination of the member, shall certify that the member is mentally or physically incapacitated for further

> performance of duty, that such incapacity is likely to be permanent and that the member should be retired.

Act No. 44 § 6A(1) (emphasis added). Since 1977, the General Assembly has amended the GARS disability statute very little. In 1985, the General Assembly amended the disability eligibility requirements by adding "or any contributing member who is disabled as a result of an injury arising out of and in the course of the performance of his duties regardless of length of membership on or after July 1, 1985." 1985 Act No. 74 § 4. The current version of the disability statute for GARS provides, in pertinent part:

> Upon the application of a member in service or of the State, any member in service on or after July 1, 1977, who has five or more years of credited service or any contributing member who is disabled as a result of an injury arising out of and in the course of the performance of his duties regardless of length of membership on or after July 1, 1985, may be retired by the board not less than thirty days nor more than ninety days next following the date of filing the application on a disability retirement allowance if the system, after a medical examination of the member, shall certify that the member is mentally or physically incapacitated for further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired.

S.C. Code Ann. § 9-9-65(1) (1986 & Supp. 2005) (emphasis added). Similar to the SCRS disability statute and the PORS disability statute, for almost thirty years, the General Assembly has not substantively amended the first requirement set forth in the GARS disability statute that provides for an application to be filed while a member is "in service."

Rules of Construction

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). The text of the statute is the best evidence of the legislative intent of the statute. Knotts v. S.C. Dep't of Natural Res's, 348 S.C. 1, 558 S.E.2d 511 (2002). The Court, therefore, should refer to the language of the statute to determine whether the statute's meaning is clear on its face. Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001). If the statute's language is plain and unambiguous, there is no basis for employing rules of statutory interpretation "and the court has no right to look for or impose another meaning." Kennedy, 345 S.C. at 346, 549 S.E.2d at 246 (quoting Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)). Statutory construction requires the court to read the words of the statute according to "their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Cox v. BellSouth Tele., 356 S.C. 468,

472, 589 S.E.2d 766, 768 (Ct. App. 2003). Furthermore, the court must read the language of the statute in such a way as to harmonize it with its subject matter and in accordance with its general purpose. Id. at 472, 589 S.E.2d at 768.

Construction of "In Service"

"The right to retirement benefits is purely statutory and, in the absence of a provision in the statute directing otherwise, the right to benefits does not arise until an application is made and proof is submitted as the statute requires." Anderson v. South Carolina Retirement Sys., 278 S.C. 161, 164, 293 S.E.2d 312, 314 (1982). As set forth above, when enacting the disability statutes, the General Assembly established the eligibility requirements for SCRS members receiving disability retirement benefits in Section 9-1-1540. Broken down succinctly and in relevant part, Section 9-1-1540 sets forth that "[u]pon the application of a member in service . . ., a member in service . . . may be retired by the board . . . ." This phrase requires the member to make an application and establishes a time for making that application (i.e., while the member is "in service").

"If a statute's language is plain, unambiguous, and conveys a clear meaning the rules of statutory interpretation are not needed and the court has no right to impose another meaning. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (citations and quotations omitted). The normal meaning of the word "in-service" is "1. Of, relating to, or being a full-time employee. 2. Taking place or continuing while one is a full-time employee." The American Heritage College Dictionary, Third Edition, Houghton Mifflin Co. (1993) at page 703. This definition is echoed by Merriam-Webster Online Dictionary defining "in-service" as "1: going on or continuing while one is fully employed <*in-service* teacher education workshops>; 2: of, relating to, or being one that is fully employed <*in-service* police officers>." Merriam-Webster Online (2005), <http://www.m-w.com>." The plain language of Section 9-1-1540 thus unquestionably provides that the members must make their applications for disability retirement benefits while they are "in service" or "employed." Therefore, there is no need for employing rules of statutory interpretation to determine the meaning of "in service."

Furthermore, even if the term "in service" is ambiguous, the proper construction of that term is nevertheless the same. "It is never to be supposed that a single word was inserted in the

law of this state without the intention of thereby conveying some meaning." Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993). Here, the General Assembly did not expand the application process to all members of the system, but instead limited it to a member "in service." If the General Assembly had intended to include all members of the system, whether "in service" or not, it would not have needed to add the words "in service." Therefore, the General Assembly clearly intended to convey some meaning by including the words "in service." That meaning is illustrated in S.C. Code Ann. § 9-11-90(3) (2005). Section 9-11-90(3) provides that:

> Should any other beneficiary who has been restored to active employment continue in service for a period of forty-eight consecutive months and his annual compensation be equal to or greater than seventy-five percent of his average final compensation at retirement, then he may elect to cease his retirement allowance and become a contributing member again and void his election of an optional benefit.

Clearly, Section 9-11-90(3) equates "in service" with "active employment." "It is well-settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). Thus, the only logical interpretation of the language of the disability statutes is again that the General Assembly intended for an application to be filed by a member who is "employed" at the time of the application.

This conclusion is further reinforced by the repetitive use of the term in Section 9-1-1540. Ambiguity may have been perceived if the statute had set forth only the second use of the term "in service" stating that "a member in service . . . may be retired by the board," if the member is permanently incapacitated from the performance of their duty. However, the first use of the term provides that the application must be of "a member in service." Inversely, in the context of disability retirement benefits, an employee who is not "in service" (or not on an employer's payroll in a paid or approved unpaid capacity) can not seek disability retirement benefits.

Additionally, "the construction of a statute by an agency charged with its administration will be accorded most respectful consideration and will not be overruled absent compelling reasons." Jasper County Tax Assessor v. Westvaco Corp., 305 S.C. 346, 348, 409 S.E.2d 333, 334 (1991). Likewise, "[w]here an administrative agency has consistently applied a statute in a particular manner, its construction should not be overturned absent cogent reasons." Gilstrap, et

al. v. S.C. Budget and Control Bd., 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992).[3] The Office of the Attorney General opined in 1977 that:

> The language of the statute [now Section 9-1-1540] clearly appears to refer to retirement by the Budget and Control Board of a member who is in service at the time of his application. It is thus the opinion of this office that an application after employment has ceased is untimely.

Op. S.C. Att'y Gen. 1977 WL 37369 (June 22, 1977). Since the date of that opinion, the Board has interpreted Section 9-1-1540 to mean that an employee is only "in service" if the employee is currently employed by the agency from which the employee seeks to claim disability.[4]

In Ryder Truck Lines, Inc. v. S.C. Tax Comm'n, 248 S.C. 148, 149 S.E.2d 435 (1966), the South Carolina Supreme Court faced an issue similar to the case before this court. In Ryder, the Court was interpreting a tax statute that had to be construed most favorably to the taxpayer, and with any doubt resolved against the taxing authority. However, in Ryder the statute that the court was construing had been amended twice and reenacted in four successive Codes with no successful attempt to avoid the significant impact of the statute, as construed by the commission. The Court found that under those "extreme facts" the favorable construction due to the taxpayer was overridden by "a strong presumption . . . that the administrative construction has the approval of the legislature." 149 S.E.2d at 437; see also Etiwan Fertilizer Co. v. S.C. Tax Comm'n, 217 S.C. 354, 60 S.E.2d 682 (1950).

Here, the ALC is required to liberally construe the retirement statute in favor of those to be benefited and the objective sought to be accomplished. Stuckey v. State Budget and Control Bd., 339 S.C. 397, 529 S.E.2d 706 (2000). Likewise, however, the Retirement statutes in which the term "in service" is used have been amended on numerous occasions without any modification of that term, even though the Board has consistently construed "in service" to mean employed by the agency from which the employee seeks to claim disability. Moreover, that construction was referenced in Stuckey. Accordingly, there is also a presumption that the

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[3] Though the Board's interpretation in this instance is entitled respectful consideration, the weight of that consideration may be lessened since the interpretation of "in service" does not necessarily involve "the exercise of administrative expertise." Stuckey v. State Budget and Control Bd., 339 S.C. 397, 403, 529 S.E.2d 706. 709 (2000) (Toal, J., dissenting). ("While this Court will give the statutory construction of the officials charged with its administration respectful consideration, an agency's position is accorded less weight in situations. . . where the interpretation of the statute does not involve the exercise of administrative expertise.").

[4] In fact, the Board contends that since 1945, when the first disability retirement benefits statute was enacted, the Retirement Systems has interpreted the term "in service" to mean that the applicant was still an employee of the agency.

legislature had notice of that judicial decision. See Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (there is a "basic presumption that the legislature has knowledge . . . of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."), cited in State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

Moreover, "[w]here the statute uses a word having a well-recognized meaning in law, the presumption is that the Legislature intended to use the word in that sense." Coakley v. Tidewater Constr. Corp., 194 S.C. 284, 288, 9 S.E.2d 724, 726 (1940). Here, other courts have also interpreted the term "in service" as applying solely to individuals who are employed.[5] In Walker v. Board of Trustees of the N.C. Local Gov't Employees' Ret. Sys., 127 N.C. App. 156, 487 S.E.2d 839 (Ct. App. 1997), the petitioner's wife, who had been on disability retirement, sought a death benefit under the North Carolina Local Governmental Employees' Retirement System. In concluding that the petitioner was precluded from recovering the death benefit, the Court held that "an employee's time 'in service' is the time for which salary is earned." 487 S.E.2d at 841. See also Woolison v. City of Tucson, 146 Ariz. 298, 705 P.2d 1349 (1985) (an officer who attempted to retire from his commissioned police position, yet remain "in service" with the city, was precluded from doing so because retirement was defined as termination of employment); Ark. Fire and Police Pension Review Bd., 309 Ark. 537, 832 S.W.2d 239 (1992) (only those presently in service can remain in service for the purposes of receiving enhanced benefits); Douglas v. Bd. of Trustees of Maine State Ret., 669 A.2d 177 (Me. 1996) (an employee is no longer in service after the date he last received compensation); City of St. Louis v. Milentz, 887 S.W. 2d 709 (Mo. Ct. App. 1994) (members may retire at the age of sixty if they are in service); Tapia v. City of Albuquerque, 104 N.M. 117, 717 P.2d 93 (2003) (employee had a break in service between his prior resignation and subsequent reinstatement); Bd. of Trustees of Police Pension and Ret. of Oklahoma City v. Faris, 470 P.2d 981 (Okla. 1970) (an officer who sustained personal injuries while in service is entitled to a disability pension); Wirt v. Parker Sch. Dist., 2004 SD 127, 689 N.W.2d 901 (2004) ("there is a break in service upon resignation");

[5] The cases cited below deal with various retirement or death benefit issues. Nevertheless, though these cases may not directly address the retirement issue in this case, their holdings are certainly significant considering that the term "in service" is used not only in Section 9-1-1540, but also in twenty-two other statutes in Title 9.

Kellum v. Dept. of Ret. Sys., 61 Wash. App. 288, 810 P.2d 523 (1991) (a member shall be considered in service only while he is receiving compensation from the city). [6]

The Silson Case

In Anderson v. South Carolina Retirement System the Court held that:

> Whether the statute is to be construed as limiting the time for making application to the period when the applicant was actually employed or whether the language "in service" is intended to only require that the employee must be employed or "in service" when the disability occurs is not before us, for respondent concedes that, under the present facts, appellant's application was timely filed. See: Silson v. N.Y. State Employees' Ret. Sys., 208 Misc. 59, 144 N.Y.S.2d 476.

293 S.E.2d at 314. The Petitioner relies heavily upon the court's reference to the holding in Silson v. N.Y. State Employees' Ret. Sys., 144 N.Y.S.2d 476 (N.Y. Sup. Ct. 1954), aff'd, 143 N.Y.S.2d 893 (N.Y. App. Div. 1955), to support her position. In Silson, a New York state employee sustained an injury while working on August 31, 1950, that rendered him unable to work. By using accrued leave credits, he was able to continue to receive his full salary until April 26, 1951. On January 13, 1954, he applied for an accidental disability retirement allowance pursuant to a former version of Section 79 of the New York Civil Service Law.[7] His application was rejected on the basis that he had ceased to be "in service" on April 26, 1951 and that, therefore, he was not eligible to seek disability retirement on the date that he applied for the allowance. Thereafter, he commenced a proceeding with the New York Supreme Court to compel the acceptance of his application. The court granted his petition. In doing so, the court stated:

> If the legislature had intended to provide a limitation of time within which the injured employee should be required to apply for such disability benefits, the

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[6] See also, Idaho Code §33-1217 (when a school district employee transfers to a newly formed district, that employee continues in service and all accumulated leave transfers with them); Wis. Stat. §21-7-103 ("absences and leaves of absence approved by the employing board shall not be considered as interruptions in service for purposes of determining continuing contract status").

[7] At the time of the Silson decision, Section 79 of the New York Civil Service Law stated in pertinent part:

> a. A member in service upon which his membership is based, shall be entitled to an accidental disability retirement allowance if he is: (1) Under age of sixty, and (2) Physically or mentally incapacitated for performance of duty as the natural and proximate result of an accident not caused by his own willful negligence sustained in such service and while actually a member of the retirement system.
> b. Application for an accidental disability retirement allowance for such a member may be made by: (1) Such member, or (2) The head of the department in which such member is employed, or (3) Some person acting on behalf of such member.

N.Y. Civ. Serv. Law § 79 (1947). As will be discussed herein, N.Y. Civ. Serv. Law § 79 (1947) was subsequently amended and became N.Y. Retire. & Soc. Sec. Law § 63.

> legislature would have expressly stated such limitation and undoubtedly would have provided a reasonable time following the date of the accident within which the application would be required to be filed . . . In the court's opinion a reasonable construction of the statute is that the words 'in service' were intended to require that the injured employee must be in service at the time he suffered the injury but do not require that the injured employee must be in service at the time he makes application for disability benefits.

Id. at 479.

For several reasons, this Court is not persuaded by the decision in Silson. First, S.C. Code Ann. § 9-1-1540 (1986 & Supp. 2005) differs in an important respect from the statute interpreted in Silson. Specifically, unlike the Silson statute, Section 9-1-1540 uses the phrase "member in service" twice, once to describe those individuals who may properly apply for benefits, and then again to describe those individuals who are entitled to such benefits. Thus, the statute being interpreted here is much clearer than the New York statute in Silson.

Furthermore, in New York, as well as South Carolina, the Court's "cardinal function in interpreting any statute should be to . . . effectuate the intent of the Legislature." Niagara Mohawk Power Corp. v. Town of Clay Bd. of Assessors, 208 A.D.2d 170, 622 N.Y.S.2d 635 (N.Y. App. Div. 1995) (citations omitted); McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). However, the statute interpreted in Silson was amended shortly after, **and as a direct result of,** the decision in Silson. See Matter of O'Marah v. Levitt, 324 N.E.2d 140, 142 (N.Y. 1974) (Jasen, J., dissenting); Wilson v. Levitt, 410 N.Y.S.2d 744, 745 (N.Y. Sup. Ct. 1978), aff'd, 434 N.Y.S.2d 815 (N.Y. App. Div. 1980); Matter of Clark v. Levitt, 316 N.Y.S.2d 855, 857 (N.Y. App. Div. 1970). Specifically, the statute[8] in dispute in Silson was amended to state that a member would not be entitled to accident disability retirement benefits unless his application for retirement benefits was filed while he was "actually in service" or within two years after he was first discontinued from service. O'Marah, 324 N.E.2d at 142. More importantly, at the time Section 79 was amended, Section 78 of the New York Civil Service Law, which dealt with **ordinary disability benefits** and which contained identical language to Section 79, was similarly amended.[9] Clark, 316 N.Y.S.2d at 857. Notably, at the

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[8] The statute in dispute in Silson was Section 79 of the New York Civil Service Law. Upon amendment, the statute became Section 63 of the New York Retirement and Social Security Law.

[9] However, in contrast to the two year grace period allowed by Section 63 of the New York Retirement and Social Security Law, Section 62 of the New York Retirement and Social Security Law, which replaced Section 78 of the

time of the passage of the Section 78 amendment, the explanatory note in the New York State Legislative Manual stated: "The purpose of this bill **is to make clear** that an application for ordinary disability may be made by or on behalf of a member **who is actually in service or on leave of absence**." Wilson, 410 N.Y.S.2d at 745 (emphasis added). Thus, it appears that the Silson court's interpretation was not the intent of the legislature. Rather, the New York legislature meant that the term "in service" provides a time limitation on applications for disability retirement benefit.

Accordingly, since the 1956 amendments to Sections 78 and 79 of the New York Civil Service Law, New York courts have consistently held that applications for ordinary and accidental disability retirement benefits must be made while a member is "actually in service" or within the grace period allowed by each section. See, e.g., Matter of Carmody v. McCall, 691 N.Y.S.2d 208, 209 (N.Y. App. Div. 1999) ("[A]n application for ordinary disability retirement benefits must be filed while the applicant is actually in service or within ninety days from the end of service."); Matter of Leyden v. Regan, 578 N.Y.S.2d 706 (N.Y. App. Div. 1992) (affirming decision disapproving application for accidental disability retirement benefits where application was made more than two years after employee was discontinued from service); Matter of Elsasser v. Regan, 472 N.Y.S.2d 754, 755-56 (N.Y. App. Div. 1984), aff'd, 468 N.E.2d 703 (N.Y. 1984) (holding that the term "actually be in service" means either on unpaid leave or working and on the payroll); Matter of Wilson v. Levitt, 434 N.Y.S.2d 815, 816 (N.Y. App. Div. 1980) (affirming decision disapproving application for ordinary disability retirement benefits and stating"[t]he plain language of [Section 62] leaves no room for interpretation . . . it is obvious that petitioner was not 'in service' at the time his application was filed."). Thus, it appears that the Silson court's decision did not correctly interpret the meaning of "in service" and is clearly no longer relevant precedent in New York. Therefore, for all of these reasons, this Court does not find Silson persuasive.

Conclusion

We conclude that the words "member in service," as used in Section 9-1-1540, and as applied to an employee seeking disability retirement benefits, plainly mean a person having the status of an employee by virtue of a contract of employment that is in effect at the time the

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New York Civil Service Law, grants only a ninety day grace period. See N.Y. Retire. & Soc. Sec. Law § 62 (McKinney, Westlaw through 2006 legislation).

application for disability benefits is filed, specifically including those on accrued annual leave or sick leave. Even if the meaning were ambiguous, the Department's interpretation that an employee must apply for the benefits while the employee is on employer's payroll in a paid or approved unpaid capacity is reasonable and there is no compelling reason to overrule that interpretation. See Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991).

We recognize the time constraints that our decision places upon applicants for disability retirement benefits.[10] In that regard, the South Carolina Supreme Court recently addressed a case involving a remedial statute with a similarly troubling result in Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006). The Court concluded that:

> We find Capco's action is time-barred by the thirteen year time-period set forth in § 15-3-640(6). However, we are troubled by the harsh result in the case. As Capco correctly points out, where a lawsuit is filed on the eve of the running of the statute of repose, but is not resolved until after the statute has run, the contribution action will be barred before the right has even accrued, placing an undue burden on a single tortfeasor. This is clearly contrary to the purposes of the Contribution Act, which was to ameliorate the unfairness vested on all joint tortfeasors by the common law's prohibition against contribution. However, although we are

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[10] As pointed out by Petitioner's counsel, if the term "in service" is strictly construed, there are conceivable instances in which an applicant may be unable to make the application while still "in service", *e.g.*, where the applicant has been terminated prior to making the application. The Board currently allows disability retirees 90 days to file a claim following an employee's termination to insure that no such inequities occur. However, that grace period is not set forth in the statute nor has it been promulgated by regulation. Interestingly, the Board argues that Section 9-1-1540 is not ambiguous, yet fashions it own resolution of a fair result by granting a 90 day grace period to file a claim. Yet in the face of challenges to its interpretation of Section 9-1-1540, the Board has not heeded the advice propounded by Justice Toal in Stuckey v. State Budget and Control Bd., 339 S.C. 397, 529 S.E.2d 706 (2000), that it adopt its grace periods via regulation. The Board has, indeed, created its own Gordian knot. For instance, in Matter of Ford, 52 N.C. App. 569, 279 S.E.2d 122 (Ct. App. 1981), the petitioner contended that the Board of Trustees of the Retirement System was wrong in its conclusion that the Retirement System did not have discretionary power to extend or waive statutory deadlines to purchase credit for his withdrawn account and out-of-state service. In upholding the Board's decision, the Court held that:

> G.S. 135-6(f) empowers the Board of Trustees of the Retirement System to "adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter." Rules and regulations are general policies which, when adopted, are applicable across the board. Petitioner is contending that the Board should waive the deadline in his case, despite the fact that no misrepresentation by the State, however innocent, caused him to miss the deadline. Such action would not be a rule or regulation to prevent injustice and inequality across the board, but simply a waiver in a specific instance. This the statute does not contemplate. If petitioner wants a rule or regulation promulgated which would have the effect of waiving the statutory deadline in his case, he must follow the procedure set forth in G.S. 150A-16.

Nevertheless, since Anderson does not rely on the ninety-day grace period to establish timeliness, the issue of the efficacy of the grace period granted by the South Carolina Retirement Systems is not before us and need not be decided.

> troubled by this result, we are not at liberty to rewrite the statutes, and any amendment must come from the Legislature.

628 S.E.2d at 42 (citations and quotations omitted). The Court's comment at the conclusion of that opinion is equally applicable here.

The California Court of Appeals has also recognized this concept in construing disability benefits statutes. Gutierrez v. Board of Ret. of Los Angeles County Employees Ret. Ass'n, 62 Cal.App.4th 745, 72 Cal.Rptr.2d 837 (Cal. App. 2 Dist., 1998). In Gutierrez, a spouse of a member in Los Angeles County Employees Retirement Association applied for service-connected disability benefits outside of the statutory time limit for submitting an application for service-connected benefits. The California Court of Appeals determined that Mrs. Gutierrez did not make a timely application for the service-connected disability benefits. In making that determination the Court held that:

> Whatever merit there might be to the trial court's finding that it would be "equitable" to read into section 31722 a provision that would permit Mrs. Gutierrez to apply for conversion of her non-service-related benefits to service-related benefits, it is not the job of the courts to expand the scope of retirement benefits created by the Legislature and spelled out in a detailed statutory scheme.

Accordingly, notwithstanding any impediment addressed above, we cannot invade the province of the South Carolina Legislature by expanding the terms of the statute beyond its plain meaning.

AND IT IS SO ORDERED

KITTRELL, C.J., ANDERSON, MATTHEWS and GOSSETT, JJ., concur.

GEATHERS, J., not participating.

August 21, 2006
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 21st day of August, 2006
By: Jane Healy
[redacted] Clerk