

The State of South Carolina

History 3139



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February 19, 1988

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Dear Phyllis:

As you are aware, Attorney General Medlock has referred your letter dated January 27, 1988, to me for response. By your letter, you have requested an Opinion on three (3) interrelated questions concerning the provisions contained in S.C. Code Ann. §§8-11-40 (1976) about administrative leave with pay for state employees:

1. Does the Budget and Control Board have authority to develop regulations governing the administration of the administrative leave with pay for employees as provided in Section 8-11-40?
2. If so, does the Budget and Control Board have the authority to limit the number of days of administrative leave with pay an employee may use in place of sick leave when injured on the job as provided in Section 8-11-40?
3. Does the Budget and Control Board have the authority to establish, by regulation, that agencies' determinations on the eligibility of an employee for administrative leave be subject to review by the Budget and Control Board?

Phyllis M. Mayes
Page Two
February 19, 1988

The purpose of construing a statute is to ascertain the intention of the legislature. State v. Martin, ___ S.C. ___, 358 S.E.2d 697 (1987); Multi-Cinema, Ltd. v. South Carolina Tax Comm'n, 292 S.C. 411, 357 S.E.2d 6 (1987); Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E.2d 723 (1984); Citizens and Southern Systems, Inc. v. South Carolina Tax Comm'n, 280 S.C. 138, 311 S.E.2d 717 (1984). When interpreting a statute, legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in light of the intended purpose of the statute. Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983). In construing a statute, words must be given their plain and ordinary meaning, without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law of the state must be construed together and each one given effect, if it can be done by any reasonable construction. Smalls v. Weed, ___ S.C. ___, 360 S.E.2d 531 (Ct. App. 1987). The choice of language, arrangement and grammatical construction of an act will not be construed with literality when that would defeat the manifest intention of lawmakers, determined upon consideration of the entire act, related legislation, facts and conditions. State v. Gilliam, 208 S.C. 126, 37 S.E.2d 299 (1946). It is presumed that the legislature is familiar with prior legislation dealing with the same subject when it passed the law involved. Bell v. South Carolina State Highway Dep't, 204 S.C. 462, 30 S.E.2d 65 (1944). An amendment to a statute becomes a part of the original statute as if always contained therein. Windham v. Pace, 192 S.C. 271, 6 S.E.2d 270 (1940).

Axiomatically, administrative agencies, which are creatures of statutes, have no common-law or inherent jurisdiction or powers; therefore, they have only such powers as have been granted to or conferred upon them by statute, expressly or by implication. See Piedmont & Northern Ry. Co. v. Scott, 202 S.C. 207, 24 S.E.2d 353 (1943). Accord 1 Am. Jur.2d Administrative Law §70; 73 C.J.S. Public Administrative Law and Procedure §49; Sutherland Stat. Constr. §§65.01 & 65.02 (4th ed. 1986). In Bostic v. City of W. Columbia, 268 S.C. 386, 390, 234 S.E.2d 224, 226 (1977), the South Carolina Supreme Court stated that "enabling legislation is not merely precatory, but prescribes the parameters of conferred authority." According to 73 C.J.S. Public Administrative Law and Procedure §51,

Phyllis M. Mayes
Page Three
February 19, 1988

The powers of administrative agencies, bodies, or officials are not to be derived from mere inference, and their jurisdiction cannot be conferred by implication. As a general rule, however, in addition to the powers expressly conferred on them by organic or legislative enactment, such officials and bodies, in the absence of restricting limitations of public policy or express prohibitions, or express provisions as to the manner of exercise of the powers given, have such implied powers, and only such implied powers, as are necessarily inferred or implied from, or incident to, the express powers granted to, or duties imposed on, them. Thus, they possess the powers reasonably necessary and fairly appropriate to make effective the express powers granted to, or duties imposed on them, and to accomplish the purposes of the legislation which established them.

The implied powers of administrative agencies and bodies are not to be extended beyond fair and reasonable inferences, or what may be necessary for the just and reasonable execution of the powers expressly granted. The general power conferred on an administrative board by a statute vesting it with all powers necessary to carry out the provisions of the act that created it has been held not to extend its jurisdiction, and to relate only to those matters over which it has been given jurisdiction. [Footnotes omitted.]

"The general rules governing construction and interpretation of statutes and ordinances are applicable to statutes and ordinances creating or empowering administrative agencies." 1 Am. Jur.2d Administrative Law §36. Sutherland Stat. Constr. §55.03 (4th ed. 1986) provides, in part:

The usual standard used to interpret a statute by implication or inference is used to determine if the statute embraces such consequential applications and effects as are necessary, essential, natural or proper. Although these are not terms having precise

Phyllis M. Mayes
Page Four
February 19, 1988

meaning capable of measured application, it seems fair that in order for a consequence to be implied from a statute there must be greater justification for its inclusion than a consistency or compatibility with the act from which it is implied. "A necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed." And it has been more fully explained that: "[s]uch implication, inference, or presumption, as the fact may be, is always indulged to supply a deficiency, and is never permitted to contradict the act, grant, or instrument whatsoever involved. Moreover, to authorize the supplying of a power by implication, inference, or presumption of intention, it is not sufficient that the act is advantageous or convenient to the major power conferred, or even effectual in the exercise of it. The power to be supplied by such process must be practically indispensable and essential in order to execute the power actually conferred." [Footnotes omitted.]

S.C. Code Ann. §8-11-40 (1976) provides:

All permanent full-time state employees are entitled to fifteen days sick leave a year with pay. Sick leave is earned by permanent full-time state employees at the rate of one and one-fourth days a month and may be accumulated, but no more than one hundred eighty days may be carried over from one calendar year to another. The department or agency head is authorized to grant additional sick leave in extenuating circumstances upon approval of the State Budget and Control Board. All permanent part-time and hourly employees are entitled to sick leave prorated on the basis of fifteen days a year subject to the same carry-over specified herein. In the event an employee transfers from one state agency to another, his sick leave balance also is transferred. The State Budget and Control Board, through the Division of Personnel, may promulgate those

Phyllis M. Mayes
Page Five
February 19, 1988

regulations in accordance with law as may be necessary to administer the provisions of this section, including the power to define the use of sick leave.

Permanent full-time state employees who are temporarily disabled as a result of an assault by an inmate, patient, or client must be placed on administrative leave with pay by their employer rather than sick leave.

Employees earning sick leave as provided in this section may use not more than five days of sick leave annually to care for ill members of their immediate families. For purposes of this paragraph, "immediate family" means a spouse and children. [Emphasis added.]

The next to last paragraph of §8-11-40, emphasized above, was added by 1985 S.C. Acts 58 §1. S.C. Code Ann. §8-11-41 (1976) provides:

The provisions of §8-11-40 shall apply to all state agencies, department [sic] and institutions and shall be administered by each such agency, department and institution pursuant to rules and regulations adopted by the State Budget and Control Board. The sick leave records of all agencies, departments and institutions coming under the provisions of this section and §8-11-40 shall be subject to audit by the Budget and Control Board. [Emphasis added.]

Concerning its duties relative to personnel administration, the State Budget and Control Board is, pursuant to S.C. Code Ann. §8-11-230 (1976), authorized and directed, inter alia, to:

After coordination with agencies served, develop policies and programs concerning leave with or without pay, hours of work, fringe benefits (except State retirement benefits), employee/management relations, performance appraisals, grievance procedures, employee awards, dual employment, disciplinary action, separations, reductions in force, and other conditions of employment as may be needed. [Emphasis added.]

Phyllis M. Mayes
Page Six
February 19, 1988

S.C. Code Ann. §8-11-230(6) (1976)

To respond to all three of your questions, the threshold issue for analysis is whether the State Budget and Control Board is empowered by statute to promulgate regulations concerning administrative leave with pay for permanent full-time state employees who are temporarily disabled as a result of an assault by an inmate, patient, or client. Section 8-11-40, entitled "Sick leave," provides that "[t]he State Budget and Control Board, through the Division of Personnel, may promulgate those regulations in accordance with law as may be necessary to administer the provisions of this section, including the power to define the use of sick leave." Similarly, §8-11-41, entitled "Sick leave: application to all state agencies, departments and institutions; auditing of sick leave records" provides that "[t]he provisions of §8-11-40 shall apply to all state agencies, department [sic] and institutions and shall be administered by each such agency, department and institution pursuant to rules and regulations adopted by the State Budget and Control Board." Clearly, §§8-11-40 & -41 expressly empower the State Budget and Control Board to promulgate regulations to administer sick leave.

The question arises as to whether the phrases "to administer the provisions of this section," contained in §8-11-40, and "[t]he provisions of §8-11-40," contained in §8-11-41, include the paragraph added to §8-11-40 by 1985 S.C. Acts 58 §1. Sutherland Stat. Constr. §22.35 (4th ed. 1985) provides:

The general rule of statutory interpretation that a provision in an act is to be read in its context, is applicable to the interpretation of amendatory acts. The same principle is expressed with reference to whole statutes; if an amendment is regarded as a separate act rather than part of an existing act, a statute is to be read in connection with other statutes pertaining to the same subject matter. The original section as amended and the unaltered sections of the act, code, or compilation of which it is a part, relating to the same subject matter, are to be read together. The act or code as amended should be construed as to future events as if it had been originally enacted in that form. Provisions in the unamended sections applicable to the original section are applicable to the section as amended in so far as they are consistent.

Phyllis M. Mayes
Page Seven
February 19, 1988

The phrase "this act" in a section as amended is generally held to refer to the whole act and not merely to the amending act. Words used in the unamended sections are considered to be used in the same sense in the amendment. And accordingly, a change in phraseology indicates a change in meaning. The legislature is presumed to know the prior construction of the original act or code and if previously construed terms in the unamended sections are used in the amendment, it is indicated that the legislature intended to adopt the prior construction of those terms. Some courts have gone further and declared that it may be presumed that the legislature intended to adopt the prior construction of the unamended sections relating to the same subject matter merely because it failed to amend those provisions.

If the section as amended is inconsistent with prior judicial interpretation of related sections, it is presumed that the legislature knew it, and the amendment controls. In the absence of express evidence to the contrary, the section as amended is to be construed to have the same scope as the unaltered sections of the original statute. The unchanged sections and the amendment are to be interpreted so that they do not conflict. All the provisions of both are to be given effect and reconciled if possible. But where an unaltered section and the amendment cannot be reconciled, the provisions of the amendatory act, which is the last expression of the will of the legislature, must prevail. [Footnotes omitted.]

Compare Windham v. Pace, supra, with North River Ins. Co. v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964) (Adoption of an amendment materially changing the terminology of a statute under some circumstances indicates persuasively and raises the presumption that a departure from the original law was intended, but the presumption is merely an aid in interpreting an ambiguous statute and determining legislative intent and is strongest in the case of an isolated and independent amendment but is of little force in respect of amendments adopted in general revision or codification of laws.). An argument could be made that the

Phyllis M. Mayes
Page Eight
February 19, 1988

separate paragraph added by 1985 S.C. Acts 58 §1 is an isolated, independent amendment which indicates a departure from the original, unamended language of §8-11-40 such that the State Budget and Control Board is not expressly authorized to promulgate regulations concerning the provisions of 1985 S.C. Acts 58 §1. Nevertheless, the perhaps more persuasive argument is that the paragraph added by 1985 S.C. Acts 58 §1 should be considered a part of §8-11-40 as if always contained therein and the provisions of original §8-11-40, which were unamended, are applicable to the paragraph added by 1985 S.C. Acts 58 §1 such that the State Budget and Control Board is expressly empowered to promulgate regulations concerning the provisions of 1985 S.C. Acts 58 §1. See Smalls v. Weed, supra; State v. Gilliam, supra; Bell v. South Carolina State Highway Dep't, supra; Windham v. Pace, supra. This argument seems to be further supported by the authority granted to the State Budget and Control Board in §8-11-230(6) concerning "leave with or without pay." In light of this analysis, your specific questions will be addressed seriatim.

1. Does the Budget and Control Board have the authority to develop regulations governing the administration of the administrative leave with pay for employees as provided in Section 8-11-40?

In my opinion, the better construction of S.C. Code Ann. §8-11-40 (1976) is to consider the phrase "to administer the provisions of this section" to include the paragraph added to §8-11-40 by 1985 S.C. Acts 58 §1. Therefore, S.C. Code Ann. §§8-11-40 & -41 (1976) should probably both be construed as expressly empowering the State Budget and Control Board to promulgate regulations to administer administrative leave with pay for permanent full-time state employees who are temporarily disabled as a result of an assault by an inmate, patient, or client.

2. If so, does the Budget and Control Board have the authority to limit the number of days of administrative leave with pay an employee may use in place of sick leave when injured on the job as provided in Section 8-11-40?

In Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984), the South Carolina Supreme Court stated that, although a regulation has the force of law, it must fall when it alters or adds to a statute. Accord Milliken and Co. v. South Carolina Dep't of Labor, Div. of Occupational Safety and Health, 275 S.C. 264, 269 S.E.2d 763 (1980). An administrative regulation is valid as long as it is reasonably related to

Phyllis M. Mayes
Page Nine
February 19, 1988

the purpose of the enabling legislation. Hunter & Walden Co., Inc. v. South Carolina State Licensing Bd. for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978); Young v. South Carolina Dep't of Highways and Pub. Transp., 287 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985). Administrative agencies may be authorized to fill up the details by prescribing rules and regulations for the complete operation and enforcement of law within its expressed general purpose. Young v. South Carolina Dep't of Highways and Pub. Transp., supra.

According to 1 Am. Jur.2d Administrative Law §132,

[a] legislatively delegated power to make rules and regulations is administrative in nature, and it is not and cannot be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, or impairs, limits, or restricts the act being administered.

The administrative officer's power must be exercised within the framework of the provision bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority. It is the statute, not the agency, which directs what shall be done. The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare. Administrative rules and regulations can go no further than filling in the details or interstices of the dominant act. The rulemaking power is not power to remedy legislature oversight consisting of claimed omissions from the statute.
[Footnotes omitted.]

Phyllis M. Mayes
Page Ten
February 19, 1988

S.C. Code Ann. §8-11-40 (1976) contains no limitation on the amount of time that "[p]ermanent full-time state employees who are temporarily disabled as a result of an assault by an inmate, patient, or client must be placed on administrative leave with pay by their employer rather than sick leave." Promulgation of a regulation by the State Budget and Control Board which adds a limitation on the number of days available to permanent full-time state employees pursuant to the paragraph added to §8-11-40 by 1985 S.C. Acts 58 §1 would appear more like legislating than rulemaking. See Society of Professional Journalists v. Sexton, supra; 1 Am. Jur. 2d Administrative Law §132. The more cautious approach to effectuate such a limitation would be by legislation enacted by the General Assembly. In my opinion, the State Budget and Control Board is probably not authorized to promulgate a regulation which limits the number of days of administrative leave with pay pursuant to §8-11-40.

3. Does the Budget and Control Board have the authority to establish, by regulation, that agencies' determinations on the eligibility of an employee for administrative leave be subject to review by the Budget and Control Board?

S.C. Code Ann. §8-11-40 (1976) is silent as to who is to make the determination on the eligibility of a permanent full-time state employee who is temporarily disabled as a result of an assault by an inmate, patient or client and must be placed on administrative leave with pay by their employer rather than sick leave. Such a determination appears to be practically indispensable and essential in order to accomplish the purposes of 1985 S.C. Acts 58 §1 which amended §8-11-40. See Sutherland Stat. Constr. §55.03 (4th ed. 1986); 73 C.J.S. Public Administrative Law and Procedure §51. Based on my analysis in response to your first question, the State Budget and Control Board would probably be authorized to fill up the details by prescribing rules and regulations for the complete operation and enforcement of 1985 S.C. Acts 58 §1 which amended §8-11-40, within its expressed general purpose. See Young v. South Carolina Dep't of Highways and Pub. Transp., supra. In my opinion, the State Budget and Control Board probably does have authority to establish, by regulation, a procedure for determination of an employee's eligibility for administrative leave with pay pursuant to §8-11-40. In light of S.C. Code Ann. §§8-11-210 through -300 (1976), such a procedure as suggested in your third question does not, in my opinion, appear to be prohibited.

Phyllis M. Mayes
Page Eleven
February 19, 1988

If I can answer any further questions, please do not
hesitate to contact me.

Sincerely,

Samuel L. Wilkins

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SLW/fg

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