



ALAN WILSON
ATTORNEY GENERAL

May 20, 2014

Chief David W. Jennings
Flint Hill Fire Department
1950 Highway 21
Fort Mill, SC 29715

Dear Chief Jennings:

This Office received your request for an opinion on whether section 40-80-20(B) of the South Carolina Code applies to convictions of arson which occurred prior to June 30, 2001. In your hypothetical, a person was convicted of arson and subsequently performed firefighting duties for several years before section 40-80-20 went into effect on June 30, 2001.

LAW/ANALYSIS:

Section 40-80-20 is part of the South Carolina Firefighters Employment and Registration Act, S.C. Code Ann. § 40-80-20 *et seq.* (1976 Code, as amended). Section 40-80-20 provides:

(A)(1) Prior to employment of a paid or volunteer firefighter, the fire chief or other employer must ensure that a prospective firefighter undergoes a criminal records check conducted by a law enforcement agency.

(2) The cost of the criminal records check may not exceed eight dollars.

(3) A criminal records check is not required for a firefighter employed as of June 30, 2001, if the firefighter is employed with the same fire department with which he was employed on June 30, 2001. Upon separation from the fire department where he was employed on June 30, 2001, a firefighter must comply with the provisions of Section 40-80-40.

(B)(1) After June 30, 2001, a person may not perform firefighting duties in South Carolina if the person has been convicted of, or pled guilty to, or pled *nolo contendere* to:

(a) a felony;

(b) arson or another offense provided in Article 3, Chapter 11 of Title 16;
or

(c) an offense involving a controlled substance as provided for in Chapter 53 of Title 44.

(2) The prohibition in item (1) of this subsection applies for a period of ten years after the conviction or plea of guilty or nolo contendere.

After the expiration of the ten-year period, a fire chief or other employer may determine whether to allow a person with a criminal record to perform firefighting duties; except no person may volunteer as a firefighter, be employed as a firefighter, or perform firefighting duties if he has been convicted of, pled guilty to, or pled nolo contendere to arson.

S.C. Code Ann. § 40-80-20 (1976 Code, as amended).

To make a determination, we must review the language of the statute. Our South Carolina Supreme Court has held:

Statutory construction must begin with the language of the statute. *Kofa v. U.S. Immigration & Naturalization Serv.*, 60 F.3d 1084, 1088 (4th Cir.1995). In interpreting statutory language, words are generally given their common and ordinary meaning. *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir.1998). Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning. *Hall v. McCoy*, 89 F.Supp.2d 742, 745 (W.D.Va.2000).

Jennings v. Jennings, 401 S.C. 1, 736 S.E.2d 242 (2012).

Section 40-80-20(B)(1) states that a person can not perform firefighting duties in South Carolina if the person has been convicted of arson. The words "has been" seem to indicate the past tense. The Legislature could have used the word "is" if it intended the law to apply only to convictions which occurred on or after June 30, 2001, but it did not.

Section 40-80-20(B)(2) states that no person may serve as a volunteer firefighter, be employed as a firefighter, or perform firefighting duties if he has been convicted of arson. As in section 40-80-20(B)(1), the words "has been" appear to indicate the past tense. We believe a court would find, after examining the plain language of sections 40-80-20(A) and 40-80-20(B), that the Legislature intended the statute to apply to arson convictions which occurred prior to the law going into effect.

Other sections of the statute indicate that it is applicable to prior arson convictions. Section 40-80-20(A)(3) states that a person who was employed as a firefighter when the law went into effect and who changed his employment to another fire department after June 30, 2001 must comply with section 40-80-40. Section 40-80-40 provides:

(A) No person may be allowed to perform firefighting duties with a public fire department, organization, or employer of a county, municipality, special purpose district, or other political subdivision in

this State on or after July 1, 2001, without first undergoing a criminal background check as required by Section 40-80-20 and being recommended for registration pursuant to Section 40-80-50. . .

S.C. Code Ann. § 40-80-40 (1976 Code, as amended). The requirement that one who has been employed as a firefighter but who changes his employment after the effective date of the statute must undergo a criminal background check shows the relevance of past convictions to the Legislature.

Our conclusion appears to be supported by the acts establishing section 40-80-20. Act No. 60 provided:

A person who is convicted, pleads guilty or no contest, or otherwise admits guilt, regardless of adjudication, to a felony, arson related crime, use of an illegal substance, or abuse of a controlled substance within the last ten years, shall not be allowed to perform firefighting duties in the State of South Carolina on or after July 1, 2001. . .

2001 South Carolina Laws Act 60 (S.B. 390). This act shows that the Legislature contemplated the law applying to past convictions when it was enacted.¹

Act No. 309 added the language “except no person may volunteer as a firefighter, be employed as a firefighter, or perform firefighting duties if he has been convicted of, pled guilty to, or pled nolo contendere to arson” to section 40-80-20(B)(2). We have previously opined that “South Carolina courts consider the title or caption of an act in aid of construction to show the intent of the Legislature.” Op. S.C. Atty. Gen., September 4, 2012 (2012 WL 4009947) (quoting Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972); University of South Carolina v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966)). The title to Act No. 309 stated:

AN ACT TO AMEND SECTION 40-80-20, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO A CRIMINAL RECORDS CHECK FOR A FIREFIGHTER, SO AS TO PROVIDE NO PERSON MAY VOLUNTEER AS A FIREFIGHTER, BE EMPLOYED AS A FIREFIGHTER, OR PERFORM FIREFIGHTING DUTIES IF HE HAS BEEN CONVICTED OF, PLED GUILTY TO, OR PLED NOLO CONTENDERE TO ARSON.

2008 South Carolina Laws Act 309 (H.B. 5009). The title to the act indicates that our Legislature is adamant that a person can not be a firefighter if he has been convicted of arson. Unlike convictions of a felony or an offense involving a controlled substance, there does not appear to be any discretion for a fire chief to allow a person who has been convicted of arson to perform firefighting duties.

In your letter, you asked if section 40-80-20(B) applied retroactively. “[A] statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites of its action

¹ In Act No. 224 (2002 South Carolina Laws Act 224 (S.B. 182)), the Legislature removed the ten year time limit on past convictions.

is drawn from time antecedent to its passing, but is retroactive only when it is applied to rights accrued prior to its enactment.” Op. S.C. Atty. Gen., July 1, 1983 (1983 WL 182086) (quoting 82 C.J.S., Statutes, § 412 (1953)). “The whole statute is considered to determine whether it should have retroactive effect.” 2 Sutherland Statutory Construction § 41:4 (7th ed.). “Absent a contrary legislative directive, courts presume that if any part of an act applies retrospectively, all of it is retroactive.” *Id.* Section 40-80-20(B) does not operate retroactively merely because it involves past convictions of a firefighter or of a prospective firefighter. It is also pertinent that it did not go into effect until after June 30, 2001. Accordingly, the statute does not apply retroactively.

CONCLUSION

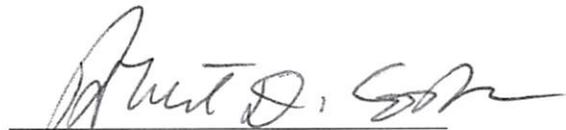
In conclusion, this Office believes that a Court would find that the Legislature intended section 40-80-20(B) to apply to arson convictions which occurred prior to the law going into effect.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General