

1975 S.C. Op. Atty. Gen. 235 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4181, 1975 WL 22476

Office of the Attorney General

State of South Carolina

Opinion No. 4181

November 17, 1975

\*1 Absent statutory authority, a State agency may not require mandatory retirement before age 70.

TO: Jack S. Mullins, Ph.D.

Director

State Personnel Division

### QUESTION PRESENTED

Whether a State employee may be forced to retire prior to age 70, solely because of age.

### STATUTES, CASES, ETC., INVOLVED

§ 61–104, Code of Laws of South Carolina, 1962, as amended, (1974, Cum.Supp.)

Act. No. 138, Acts and Joint Resolutions, 1975 (§§ 61–101, 61–336, and 61–105)

[Eisenberger v. Harrisburg Police Pension Commission](#), 162 A.2d 347 (Penn., 1960)

[Fahey v. Cook County Police Department Merit Board](#), 315 N.E.2d 573 (Ill., 1974)

[Kendall v. Malcolm](#), 404 P.2d 414 (Ariz., 1965)

[McIlvaine v. Pennsylvania State Police](#), 6 PED ¶8860

[Reed v. City of Youngstown](#), 181 N.E.2d 700 (Ohio, 1962)

[Wynn v. Doe](#), 255 S.C. 509, 180 S.E.2d 95 (1971)

1 [Am.Jur.2d Administrative Law](#), § 73.

60 [Am.Jur.2d Pension and Retirement Funds](#), § 55, p.929.

### DISCUSSION OF ISSUES

§ 61–103 of the 1962 Code, as amended, provides in part: ‘Any employee in service who has attained the age of seventy years shall be retired forthwith . . .’ This Section goes further and sets forth three (3) exceptions to the rule; however, none of these exceptions bear on the present question. The retirement policy for State employees of South Carolina is essentially set forth in Title 61 of the Code. § 61–101, as amended in 1974, provides that an employee may retire at age 60 or after 30 years of service. § 61–336, as amended in 1974, provides that an employee may retire with certain benefits at age 55 after completion of five years of service. This same Act also amends other provisions of the Retirement Act to

allow for more liberal retirement eligibility. While these sections provide for voluntary retirement before age 70 by the employee's own choosing, there is no statutory provision for an administrative agency to require mandatory retirement before age 70.

When the Legislature wants to provide for a lower retirement age it has enacted necessary statutory authorization. A clear example is that teachers must retire at age 65. § 61–102, Code of Laws of South Carolina, reads as follows: Any teacher in service who has attained the age of sixty-five years shall be retired forthwith except that (a) if he attains that age during any scholastic term he may continue in service until the completion of that scholastic year and (b) with the approval of the employing authority, from year to year, he may continue in service until he has reached the age of seventy-two.

It has been held that administrative agencies possess no inherent or common law powers. [Kendall v. Malcolm](#), 404 P.2d 414 (Ariz., 1965); see also, 1 [Am.Jur.2d Administrative Law](#), § 73. In the case of [Fahey v. Cook County Police Department Merit Board](#), 315 N.E.2D 573 (Ill., 1974), the Court stated that administrative boards and commissions could not lower the age of compulsory retirement by rule or regulation since they:

\*2 . . . exercise purely statutory powers and must find within the governing statutes warrant for the exercise of any claimed authority . . . Administrative agencies possess only such authority as is legally conferred by express provision of law or such as, by fair implication and intendment, is incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objectives for which those agencies were created . . .

(See also [Reed v. City of Youngstown](#), 181 N.E.2d 700 (Ohio, 1962), but see [McIlvaine v. Pennsylvania State Police](#), 6 EPD ¶8860, where a state statute lowering the mandatory retirement age to 60 was upheld). Thus it has been said that such bodies:

. . . cannot extend the substantive provisions of a legislative enactment nor can they create substantive rights through the exercise of their rule-making powers. [Fahey](#), supra.

It has long been established in this State that:

. . . where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and the court has no right to look for or impose another meaning. [Wynn v. Doe](#), 255 S.E. 509, 180 S.E.2d 95 (1971).

Our statute requires mandatory retirement at age 70. Although unstated in the Act, actuarial considerations may well have entered into the age 70 retirement as established by law. See [Eisenberger v. Harrisburg Police Pension Commission](#), 162 A.2d 347 (Penn. 1960). Further, 'it has been held that a fixed age for commencement of retirement is a requisite of any retirement system and that its absence renders a pension and retirement program incomplete and unenforceable.' 60 [Am.Jur.2d Pension and Retirement Funds](#), § 55, p.929.

## CONCLUSION

The Retirement Act in certain provisions provides that a member may retire at the age of 55. It also provides that any member in service who has attained the age of 70 years shall be retired forthwith. There appears to be a fifteen year period between the ages of 55 and 70 where a member may elect to retire.

No authority exists in the Retirement Act requiring a member to retire because of age before reaching age 70. It is the opinion of this office that South Carolina agencies have no authority to require employees to retire at age 65 solely because of age, absent statutory authority granted to the specific agency.

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