

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL August 27, 2014	No. I14-005 (R14-007) Re: Whether an employee “participates” in PSPRS when an employee who returns to work in a PSPRS designated position continues to receive the employee’s pension benefit and the Department makes a contribution to PSPRS on behalf of the employee
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To: Larry D. Voyles
Arizona Game and Fish Department Director

Questions Presented

You have asked whether an Arizona Game and Fish Department (“GAF”) employee who is receiving a retirement benefit from the Arizona Public Safety Personnel Retirement System (“PSPRS”) thereby “participates” in the PSPRS under Arizona Revised Statutes (“A.R.S.”) § 38-727(A)(1)(c) and is exempt from membership in the Arizona State Retirement System (“ASRS”).

Summary Answer

Under the statutes governing the PSPRS and the Arizona State Retirement System, a retired PSPRS member who returns to work with an employer participating in the ASRS and who receives PSPRS pension payments during such employment is not exempt from membership in ASRS if the PSPRS retiree otherwise satisfies the ASRS membership requirements during such period of reemployment.

Analysis

GAF has hired an employee who retired from a law enforcement position with the City of Glendale and is receiving a PSPRS pension benefit while working for GAF as permitted by A.R.S. § 38-849(H). The GAF hired the retired PSPRS member as a law enforcement specialist, which is a PSPRS-designated position in which the occupant ordinarily would meet all of the qualifications of being an active member of the PSPRS within the scope of the definition of a PSPRS “member” in A.R.S. § 38-842(31).

The reemployment of a retired member of the PSPRS is governed by A.R.S. § 38-849(H), which states as follows:

At any time following retirement, if the retired member becomes employed by an employer, other than the employer from which the member retired, in a position ordinarily filled by an employee of an eligible group, employee contributions shall not be made on the retired member’s account, and any service shall not be credited during the period of reemployment. The employer shall pay the alternate contribution rate pursuant to section 38-843.05.

Pursuant to A.R.S. § 38-849(H), while working for GAF, the PSPRS retiree will not receive PSPRS service credit nor will contributions be remitted to PSPRS on his behalf, but GAF will make the alternate contribution that A.R.S. § 38-843.05 requires.

The Legislature has mandated membership in the ASRS for all public officers and employees who meet three statutory membership requirements. First, an employee must be employed by the State of Arizona or a political subdivision of Arizona that is participating in the ASRS.

A.R.S. § 38-711(13) and (23)(a). Second, the employee’s position must be covered by the Social Security Section 218 Agreement between the United States and the State of Arizona, extending federal old age and survivors insurance to designated Arizona public officers and employees (“Section 218 Agreement”). A.R.S. § 38-727(A)(l).¹ Third, the officers and employees whose

¹ The Legislature enacted 2014 Ariz. Sess. Laws ch. 44 (effective July 24, 2014), eliminating the requirement that an employee’s position must be covered under Arizona’s Social Security Section 218 Agreement in order for an employee in

positions are covered under the Section 218 Agreement must be engaged to work at least twenty weeks in a fiscal year and at least twenty hours per week. A.R.S. § 38-711(23)(b). All public officers and employees who meet these three statutory requirements are subject to mandatory ASRS membership unless one of the exceptions in A.R.S. § 38-727(A)(1) applies.

The subject GAF employee appears to satisfy all three requirements for mandatory ASRS membership. The employee is employed by a participating ASRS employer because GAF is an agency of the State of Arizona. The position of GAF Law Enforcement Specialist is covered by Arizona's Section 218 Agreement. Finally, assuming that GAF has engaged the PSPRS retiree to work at least twenty weeks in a fiscal year and at least twenty hours per week, the GAF employee meets the ASRS membership requirement and must participate in the ASRS unless the employee is exempt from ASRS participation.

In 2001, the Legislature amended the ASRS statute to exempt from membership in ASRS “any employee or officer who is eligible to participate and who participates in the elected officials’ retirement plan . . . ;^[2]the elected officials’ defined contribution retirement system . . . ;^[3]the public safety personnel retirement system . . . ;^[4]or the corrections officer retirement plan”^[5] 2001 Ariz. Sess. Laws ch. 136, § 7 (codified in 2001 as A.R.S. § 38-727(1)(e) and codified currently as A.R.S. § 38-727(A)(1)(c)). Accordingly, the PSPRS retiree employed by GAF is exempt from

that position to be eligible for ASRS membership. Since July 24, 2014, eligibility for ASRS membership is based on whether A.R.S. § 38-727 excludes a person from ASRS membership.

² A.R.S. §§ 38-801 through -822.

³ A.R.S. §§ 38-831 through -833.

⁴ A.R.S. §§ 38-841 through -860.

⁵ A.R.S. §§ 38-881 through -91

mandatory ASRS membership under A.R.S. § 38-727(A)(1)(c) only if the retiree is *participating* in the PSPRS. The issue is whether the receipt of PSPRS retirement benefits constitutes participation.

The term “participate” is not defined in the ASRS or PSPRS statutes. Accordingly, as provided in A.R.S. § 1-213, the term “shall be construed according to the common and approved use of the language.” “By declining to define a statutory term, the legislature generally intends to give the ordinary meaning to the word.” *Circle K Stores, Inc. v. Apache Cnty.*, 199 Ariz. 402, 408, ¶ 18, 18 P.3d 713, 719, ¶ 18 (App. 2001). “[W]e will give terms ‘their ordinary meanings, unless the legislature has provided a specific definition or the context of the statute indicates a term carries a special meaning.’” *Kessen v. Stewart*, 195 Ariz. 488, 491, ¶ 6, 990 P.2d 689, 692, ¶ 6 (App.1999) (quoting *Wells Fargo Credit Corp. v. Tolliver*, 183 Ariz. 343, 345, 903 P.2d 1101, 1103 (App. 1995)).

“Participate is defined as “to take part, be or become actively involved, or share (in).” *Collins Dictionary*, CollinsDictionary.com, <http://www.collinsdictionary.com/dictionary/english> (last visited Aug. 6, 2014); see also *Merriam-Webster Dictionary*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/participate> (last visited Aug. 6, 2014) (“*a*: to take part <always participates in class discussions> *b*: to have a part or share in something.”). *The American Heritage Dictionary*, defines “participate” as follows: “1. To be active or involved in something; take part: participated in the festivities. 2. To share in something: If only I could participate in your good fortune.” *The American Heritage* ® *Dictionary of the English Language* (5th edition, 2013), <http://www.yourdictionary.com/participate#americanheritage>, (last visited Aug. 21, 2014). [cite] *Black’s Law Dictionary* defines the term “participate” as follows: “to have a share in or to join in with others in an enterprise or an endeavor.” The Law Dictionary.com, <http://thelawdictionary.org/participate/> (last visited Aug. 6, 2014).

These definitions lend little to the analysis because they are subject to contrary applications in the context of whether the receipt of retirement benefits constitutes “participation” in PSPRS. We therefore look to the Agency’s interpretation of the statute. In Arizona, ‘the contemporaneous construction of a statute by those officials charged with its administration is entitled to great weight in arriving at its proper interpretation.’ *Police Pension Bd. v. Warren*, 97 Ariz. 180, 186, 398 P.2d 892, 895 (Ariz. 1965) (quoting *Long v. Dick*, 87 Ariz. 25, 347 P.2d 581 (Ariz. 1959)). In *Eastern Vanguard Forex, Ltd. v. Arizona Corporation Commission*, 206 Ariz. 399, 410, ¶ 35, 79 P.3d 86, 97, ¶ 35 (App. 2003), the court of appeals said the following: “[E]ven though we resolve questions of law involving statutory construction de novo, we give great deference to the agency’s interpretation and application of the statute.” Since the enactment in 2001 of what now is A.R.S. § 38-727(A)(1)(c), the ASRS has interpreted and applied the exemption from ASRS membership of an employee “who is eligible to participate and who participates in” any of the retirement plans listed in the statute as exempting from ASRS only an employee who is making contributions to and earning credited service in another plan.⁶

From the foregoing, we conclude that “participate” should be construed to mean actively contributing and accruing credited service rather than some other passive membership status such as retired, inactive or receiving long-term disability benefits. This conclusion is consistent with the conclusion reached on a similar question involving a retired corrections officer. In Ariz. Att’y Gen. Op. I01-018 (R00-056), the Attorney General opined that pursuant to A.R.S. § 38-727(1)(e) (now A.R.S. § 38-727(A)(1)(c)), a correctional officer who had retired under the Corrections Officer Retirement Plan (“CORP”) and had returned to work in a CORP-designated position was not exempt from mandatory membership in the ASRS. In that opinion, the Attorney General noted that A.R.S. §

⁶ Although this is ASRS’s long standing practice, it is not reflected in a rule or written policy.

38-884(J) (the statute that in 2001 governed the reemployment of a retired member of CORP) prohibited a CORP retiree from contributing to the CORP fund or from accruing credited service while working in a CORP-designated position, and as a consequence, precluded the employee from participating in CORP during such reemployment. Because the retired CORP member who returned to work in a CORP-designated position was not eligible to participate in CORP and was not otherwise exempt from the requirement that State employees participate in the ASRS, the Attorney General concluded that retired CORP members returning to work in CORP-designated positions had to participate in ASRS. Ariz. Att’y Gen. Op. I01-018 at 2.

Effective July 20, 2011, the Arizona Legislature required public employers to remit an Alternative Contribution Rate (“ACR”) to the applicable Arizona retirement system when a retiree returned to work in a public employment position. 2011 Ariz. Sess. Laws ch. 357, §§ 11, 20, 26 & 47 (adding A.R.S. §§ 38-766.02, -810.04, -843.05, and -891.01 within the ASRS, the Arizona Elected Officials’ Retirement Plan, the PSPRS, and the CORP statutes respectively). The Senate Fact Sheet for the legislation indicates that the Legislature established the ACR to mitigate the potential actuarial impact that a retired member who returns to work for an employer may have on ASRS, EORP, PSPRS, and CORP. Ariz. State Senate, *Final Amended Fact Sheet for S.B. 1609*, 50th Leg., 1st Reg. Sess., at 94(a) and (b) (May 10, 2011).

These statutes require participating public employers to remit an ACR in a percentage that the respective public retirement system actuarially determines on behalf of any retiree employed by the participating employer and occupying an employment position that would ordinarily be occupied by an actively contributing member of that retirement system. The ACR statutes, however, do not provide any associated benefit or service credit to the retired member on whose behalf the employer is remitting the ACR. The GAF ACR payment to the PSPRS pursuant to A.R.S. § 38-843.05

therefore does not render its employee who retired from the PSPRS as “participating” in the PSPRS for purposes of A.R.S. § 38-727(A)(1)(c).

Conclusion

A PSPRS retiree who is employed with GAF and who satisfies ASRS membership requirements is not “participating” in the PSPRS for purposes of the ASRS exclusion under A.R.S. § 38-727(A)(1)(c). A PSPRS retiree who is employed with GAF and who satisfies ASRS membership requirements must be enrolled in and contribute to the ASRS.

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