

MEMORANDUM

To: Patrick Baker, Charlotte City Attorney

From: Kelsey H. Mayo, Partner
Edwin M. Speas, Partner
Jesse St. Cyr, Partner

Date: October 31, 2019

Re: Post-Retirement Rehiring of Chief Kerr Putney

This is a response to your request for an opinion on the legality of Charlotte-Mecklenburg Police Chief Kerr Putney's announced retirement plans. Please note that we are offering this opinion to the City of Charlotte. We have not been engaged to represent, and do not represent, Chief Putney in his personal capacity.

Facts and Issue

On October 7, 2019, Chief Putney publicly announced that he planned to retire through the North Carolina Local Governmental Employees' Retirement System (LGERS) at the end of this calendar year, and then return as Police Chief in March of 2020 for a temporary term of six months. Chief Putney stated that after this temporary period as Chief, the conclusion of which will closely coincide with the end of the Republican National Convention in Charlotte, he would again separate from the City. City Manager Marcus Jones publicly stated that he had agreed to this arrangement, in essence stating the City's present intent to rehire Putney as Chief for a temporary period of six months.

There is no issue as to Chief Putney's eligibility to retire and draw a benefit under LGERS. However a question has been raised regarding whether the prearranged and publicly announced plan for Chief Putney to return to service approximately sixty days following his termination effectively negates the retirement for purposes of LGERS (meaning he could not draw his pension until the end of his temporary employment in 2020). This is due to a provision in State law that defines "retirement" under LGERS as "the commencement of monthly retirement benefits, along with the termination of employment and the complete separation from active service with no intent or agreement, expressed or implied, to return to service." G.S. 128-21(10). However, for the reasons set forth below, the "no intent or agreement ... to return to service" clause does not apply to the City's plan to rehire Chief Putney for a limited term.

In addition, it has been suggested that Internal Revenue Service regulations and guidance would prohibit such an arrangement. While it is not the City of Charlotte's obligation to ensure that LGERS is designed or operated in compliance with IRS requirements, we are unaware of any binding and generally applicable IRS guidance that prohibits the current LGERS design, which permits a temporary hireback after a break-in-service, and also note that failure to follow the terms of LGERS could subject LGERS to disqualification by the IRS.

Relevant State Law

A law enforcement member of LGERS is entitled to receive the LGERS pension benefit only upon "retirement" after meeting applicable eligibility requirements. N.C.G.S. §§ 128-21(19), 128-27.

Section 128-21(19) defines "retirement" for purposes of LGERS to mean "the commencement of monthly retirement benefits, along with the termination of employment and the complete separation from active service *with no intent or agreement, expressed or implied, to return to service.*"¹ While this definition of "retirement" under LGERS might appear to prohibit the City from having any present intent to rehire Putney as Chief, a careful parsing of the LGERS intricate definition scheme reveals that that is not the case.

The definition of "retirement" under LGERS prohibits an intent or agreement to "return to service." N.C.G.S. § 128-21(19). "Service" means "service *as an employee as described in subdivision (10) of this section . . .*" N.C.G.S. § 128-21(22). Subdivision (10) defines "employee" as "any person who is *regularly employed* in the service of and whose salary or compensation is paid by the employer as defined in subdivision (11) of this section" N.C.G.S. § 128-21(10). The critical phrase here is "regularly employed."

"Regularly employed" is also a defined term – "employment in a position for which the duties require not less than 1,000 hours of work in a calendar year, provided that *the term shall not include any individuals whose employment is considered 'temporary employment'* as defined in subdivision (22b) of this section. . . ." N.C.G.S. § 128-21(18a).²

Finally, subdivision (22b) defines "temporary employment" as "employment for a limited term, in no case to exceed 12 consecutive months on a nonrecurring basis, for an employer as defined in subdivision (11) of this section." N.C.G.S. § 128-21(22b).

Thus, reading the LGERS definitions all together, a "retirement" for purposes of LGERS means "the commencement of monthly retirement benefits, along with the termination of employment and the complete separation from active service with no intent or agreement, expressed or

¹ The "no intent or agreement" limitation was first added to the statutory scheme in 2013. Session Law 2013-288, s. 4(b). The definition also provides that "[i]n order for a member's retirement to become effective in any month, the member must perform no work for a participating employer, including part-time, temporary, substitute, or contractor work, at any time during the same month immediately following the effective first day of retirement." N.C.G.S. § 128-21(19).

² The terms "regularly employed" and "temporary employment" were first added to the LGERS statutory definitions in 2015. Session Law 2015-164, s. 8.

implied, to return to employment in a position for which the duties require at least 1,000 hours of work in a calendar year, other than employment for a limited term, in no case to exceed 12 consecutive months on a nonrecurring basis."³

Reading these definitions together, it is abundantly clear that the “no intent or agreement, express or implied, to return to service” provision does not apply if the employer, in this case the City, intends to hire back the retiring employee, in this case Chief Putney, for a limited term not to exceed 12 consecutive months, in this case six months.⁴

To summarize, it is our opinion that State law allows Chief Putney to retire under LGERS as contemplated even if the City has a present intent to rehire him in a 6-month temporary role in the future. Please also note that while this is often characterized as a "prearranged agreement," it is not binding on either the City or Chief Putney. Given the Chief's status as an employee at-will, Chief Putney would have no legal recourse if, prior to March of 2020, the City decides not to hire him back as Chief. Similarly, Chief Putney could change his mind and decide not to return as Chief.

Internal Revenue Service Considerations

While it is not relevant to the City's obligations under LGERS, the Treasurer's office has expressed concern about whether the payment of Chief Putney's pension following his retirement would cause the IRS to disqualify LGERS. In support of this concern, the Treasurer's office has cited IRS Private Letter Ruling 201147038.

An IRS private letter ruling applies only to the specific taxpayer who requested it, and “may not be used or cited by others as precedent.”⁵ Internal Revenue Code § 6110(k)(3); PLR 201147038. Accordingly, PLR 201147038 does not govern the treatment of retirements under LGERS. However, even if PLR 201147038 governed retirements under LGERS, the facts are significantly different and would not mandate the same conclusion with respect to Chief Putney's retirement.

Specifically, the employer who requested PLR 201147038 proposed to “allow employees to ‘retire’ on one day . . . and return to work” (apparently on a permanent basis) “the very next day or perhaps after a week had passed.” In this context, the IRS concluded “an employee who ‘retires’ with the explicit understanding . . . the employee will *immediately* return to service with the employer has not legitimately retired,” and “employees who ‘retire’ on one day . . . *with the explicit understanding . . . they are not separating from service* with the employer, are not legitimately retired.” (emphasis added) In contrast, Chief Putney will not immediately return to

³ The portion of the retirement definition requiring no service in the month prior to benefit commencement, as cited in footnote 1, would continue to apply, prohibiting commencement of benefits due to any "sham" terminations under which an employee returns immediately.

⁴ Similarly, the “no intent or agreement” prohibition does not apply to the hiring back of retiring employees to a position that does not require at least 1,000 hours of work in a calendar year.

⁵ PLR 201147038 demonstrates the wisdom of this rule since its analysis oddly refers to regulations under Section 409A of the tax code, which by their explicit terms do not apply to qualified retirement plans such as LGERS. Section 409A(d)(1)(A); Treas. Reg. §1.409A-1(a)(2).

service (in fact LGERS, by design, prohibits an immediate return as noted in footnotes 1 and 3). Further, unlike the PLR, we understand that Chief Putney's retirement will be treated by the City as a termination of employment for all purposes, and that although he has expressed his willingness to return for a limited period of temporary service after an absence of two months, he is free to change his mind, and the City will be under no obligation to rehire him. These distinctions and the current design of LGERS prevent us from concluding that the PLR would prohibit Chief Putney's retirement under LGERS even if the PLR governed LGERS retirements.

More importantly, while private letter rulings do not govern the treatment of LGERS retirements, the regulations under Section 401 of the tax code unquestionably do. These regulations and related, generally applicable and binding IRS guidance require that qualified plans such as LGERS be administered in accordance with their written terms. Treas. Reg. § 1.401-1(a)(2); Rev. Proc. 2019-19, Sec. 5.01(2)(b). Failure to follow the written terms of a qualified plan may result in the Internal Revenue Service seeking to disqualify the plan.

We presume the Treasurer does not intend to argue LGERS should be disqualified as it is currently designed. Thus, we must presume the Treasurer believes LGERS, including the retirement definition, is tax-qualified as it is currently written. The retirement definition in LGERS clearly permits Chief Putney to retire and begin receiving his pension benefit—even though he and the City have a present intent for him to be rehired in a 6-month temporary role after a break-in-service. Thus, refusing to permit Chief Putney to draw his LGERS benefit would be a failure to follow the written terms of LGERS and could cause the Internal Revenue Service to disqualify the plan—the very problem the Treasurer seeks to prevent.

Conclusion

In conclusion, not only does State law allow Chief Putney to retire under LGERS as contemplated, but failure of LGERS to pay his benefit in accordance with State law could endanger the tax-qualification of LGERS.