

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DST 02437

Department of State Treasurer Retirement
System Division
Respondent

DECISION

On April 19, 2012, Administrative Law Judge Melissa Owens Lassiter heard this contested case in New Bern, North Carolina. On June 11, 2012, the parties filed their respective proposed Decisions with the Office of Administrative Hearings.

APPEARANCES

For Respondent: Susannah P. Holloway, Assistant Attorney General, NC
Department Of Justice, PO Box 629, Raleigh, North Carolina
27602

ISSUE

Whether Respondent deprived Petitioner of property, ordered Petitioner to pay a fine or civil penalty, otherwise substantially prejudiced Petitioner's rights, exceeded its authority or jurisdiction, failed to use proper procedure, acted erroneously, acted arbitrarily or capriciously, or failed to act as required by law or rule when it determined that Petitioner's Teachers' and State Employees' Retirement System ("TSERS") service retirement benefits should cease, and Petitioner should repay retirement benefits Respondent paid to Petitioner from October 1, 2009 through January 31, 2011?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 135-1 *et seq*

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1, 6, 7, and 11

For Respondent: 1 - 11

WITNESSES

For Petitioner: Petitioner

For Respondent: Garry Austin

FINDINGS OF FACT

Procedural Background

1. In its February 18, 2011 Final Agency Decision, Respondent advised Petitioner that she failed to meet the requirements of N.C. Gen. Stat. § 135-1(20), and that her retirement was “null and void.” Respondent informed Petitioner that she was “ineligible for benefits you have already received from October 1, 2009 through January 31, 2011, which created an overpayment in the amount of \$46,865.44.”

2. On March 4, 2011, Petitioner filed a contested case petition with the Office of Administrative Hearings appealing Respondent’s February 18, 2011 decision. (Petition)

Adjudicated Facts

3. From 1979 through September 30, 2009, Petitioner worked for DHHS at the Caswell Center in Kinston, North Carolina as a MRHC-II/Unit Manager. (T. p. 13) Petitioner’s retirement from DHHS was effective October 1, 2009. (T. p. 13)

4. Throughout her employment with DHHS, Petitioner contributed to the Teachers and State Employees Retirement System. (T. p. 13)

5. From September 7, 1994 until February 28, 2011, Petitioner also worked at Lenoir Community College (“LCC”) on a part-time basis as an Adult Basic Education Instructor, assisting students prepare to take their GEDs in all subjects. (T. p. 15) Petitioner “never worked

on the campus, but I worked at different sites that they have in the community.” (T. pp. 15, 49) Judy Hill was the coordinator for the Adult Basic Education Program. (T. p. 51)

6. Throughout her employment with as Lenoir Community College employee, Petitioner was employed as a contractual employee as Petitioner had to sign a contract to teach for LCC. (T. p. 51) Petitioner was paid only for the hours she worked. (T. p. 15)

7. Lenoir Community College is a participating “employer” under the Teachers and State Employees Retirement system. N.C. Gen. Stat. § 135-1 *et seq.*

8. Petitioner did not contribute to the Teachers and State Employees Retirement System while working under contract for LCC.

9. Before retiring from the DHHS/Caswell Center, Petitioner discussed her retirement plans with Ms. Carol Harrell, a Caswell Center human resources representative. (T. 15-16) Petitioner told Ms. Harrell that she (Petitioner) was working for Lenoir Community College under a contract, and asked Ms. Harrell if continuing that employment would jeopardize her retirement benefits. Ms. Harrell told Petitioner that it would not, because Petitioner was not contributing to the Teachers and State Employees Retirement System through Lenoir Community College, and was not accumulating any leave. (T. p. 18)

10. On June 2, 2009, Ms. Harrell presented page one of Petitioner’s retirement application to Petitioner, and Petitioner signed and dated that page. Petitioner did not have the second page of this retirement application. In fact, Petitioner had not seen her retirement application, other than page one, before she received such application in discovery from Respondent. (T. pp. 21-23; Pet. Ex. 1) Ms. Harrell did not give those documents [pages of her retirement application] to Petitioner. (T. p. 23) Ms. Harrell did not provide Petitioner with any paperwork that would inform Petitioner that working for Lenoir Community College would jeopardize Petitioner’s retirement benefits. (T. pp. 18-20)

11. Based on her conversation with Harrell, Petitioner understood that she could still work for Lenoir Community College, and still receive retirement benefits. If Petitioner had known that continuing to work for Lenoir Community College would jeopardize her retirement benefits, she would not have continued to work at Lenoir. (T. p. 19)

12. Respondent mailed a letter dated June 17, 2009 to Petitioner’s home mailing address, advising Petitioner that it had received her retirement application. Along with this letter, Respondent provided three forms for Petitioner to complete, sign, and return to Respondent. In this letter, Respondent advised that:

A summary of the return-to- work laws that apply to the System from which you retired are located in Guides H, J, and K of Form 6 (Claiming Your Monthly Retirement Benefit).

(Resp. Ex. 2) It also advised that additional information about reemployment provisions were located available online in the Retirement System’s handbook. (Resp. Ex. 2)

13. Petitioner denies that she ever received Respondent's June 17, 2009 letter. She first saw the June 17, 2009 letter when she reapplied for retirement around March 2010 [sic], 2011. (T. p. 25) At hearing, Respondent did not present any proof that Petitioner actually received its June 17, 2009 letter. Respondent's Journal Comments on Petitioner's case indicated that on February 4, 2010, a 1099R tax form mailed to Petitioner was "returned to sender" (Respondent) because "attempted not known and unable to forward. . . [Petitioner's] address status was changed to valid to invalid, . . . and address updated." (Resp. Ex. 11)

14. On June 24, and 25, 2009, Petitioner signed the respective forms mentioned in Respondent's June 17, 2009 letter. On June 29, 2009, Respondent received the completed respective forms. (T. pp. 42-43; Resp. Ex. 3 - 5)

15. Petitioner began receiving retirement benefits in October 2009, and received about \$2500.00 per month in retirement benefits. When Petitioner began receiving retirement benefits, she believed that she had been approved to receive retirement benefits in compliance with the statutes and rules governing the Retirement system.

16. On October 19, 2009, Petitioner taught a class for Lenoir Community College. (Resp. Exs. 7, 9) During this timeframe, Petitioner taught language arts, social studies, science, and math to students two nights a week. She taught these classes in community centers, such as Simon Bright, Carter Courts, or Mitchell Wooten, to help students prepare to go to LCC to take their original GED. (T. pp. 50-51)

17. At that time, Petitioner worked up to six hours per week for an approximate wage of \$15.00 or \$16.00 per hour. (T. pp. 21-21) From November 2009 through January 2011, Petitioner received a check from Lenoir Community College for her part-time teaching. (Resp. Ex. 9)

18. Petitioner acknowledges that she "had an agreement with Lenoir Community College" that she would "continue to be available to work on a part-time basis for Lenoir Community College after" her retirement from the Caswell Center. (Resp. Ex. 7)

19. However, if Petitioner had known that she would have had to repay the benefits, because of her employment with Lenoir County Community College, she would not have worked there. Petitioner's pay at Lenoir was so modest, that doing so would make no economic sense. (T. pp. 20-21)

20. A preponderance of the evidence at hearing established that Petitioner received monthly retirement benefits from Respondent from October 1, 2009 until January 31, 2011 for \$46,865.44.

21. Sometime in January of 2011, Garry Austin, an employee of Respondent, contacted LCC regarding Petitioner's employment. (Resp. Ex. 9)

22. In either January or February of 2011, Mr. Austin called Petitioner, and told her that her retirement was null and void. (T. p. 28) Austin also informed Petitioner that it would also include her health benefits, which could be retroactive from October 2009 until 2010 [sic]. (T. p. 28)

23. Based on Respondent's revocation of Petitioner's retirement benefits, Petitioner also lost health insurance through the State retroactively from October 1, 2009 until November 1, 2011. (T. pp. 28-29, 30; Pet. Ex. 11) Since Petitioner had no other health insurance coverage retroactively, from October 1, 2009 to November 1, 2011, she had to pay over \$3000.00 in medical or doctor expenses out of her pocket. At the time of hearing, she continued to receive medical bills not covered by her State health insurance plan for that period when her health insurance was retroactively suspended. (T. pp. 31-32) On November 1, 2011, Petitioner's health insurance coverage under the State Health plan began again. (T. pp. 29-30; Pet. Ex. 11)

24. Sometime in February 2011, Petitioner completed a second retirement application, and "retired" again, effective March 1, 2011. Respondent agrees that Petitioner's retirement on March 1, 2011 complied with N.C. Gen. Stat. § 135.

25. Since that time, Respondent has been requiring Petitioner to repay the sum of \$46,865.44, which represents the retirement benefits Petitioner received from October 1, 2009 until January 31, 2011, by withholding \$450.00 a month from Petitioner's retirement benefits.

26. According to Respondent's interpretation of N.C. Gen. Stat. § 135-1, Petitioner did not effectively retire October 1, 2009, because she continued to work for the Lenoir Community College on a part-time basis after she retired from DHHS' Caswell Center.

27. At hearing, Mr. Austin agreed that [in October 2009], Petitioner worked for LCC on a contract basis, that Petitioner was not required to contribute to the Retirement system in that position, and that Petitioner was not forced to be a contributing member of Respondent's system. (T. p. 87) He agreed that given the language in N.C. Gen. Stat. § 135-1(10), that statutory section applies to employees, but not teachers. (T. p. 87-89) Austin also agreed that Petitioner is "not a teacher under twenty-five [under N.C. Gen. Stat. § 135-1(25)] to meet the definition to make contributions to the system." (T. p. 90)

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings, and the Office of Administrative Hearings has subject matter and personal jurisdiction, pursuant to chapters 135 and 150B of the North Carolina General Statutes.

2. N.C. Gen. Stat. § 135-2 establishes the retirement system for providing retirement allowances and other benefits "for teachers and State employees of the State of North Carolina."

3. N.C. Gen. Stat. § 135-3(1) provides in part that "membership in the Retirement System shall begin immediately upon the election, appointment or employment of a **'teacher or employee' as the terms are defined in this Chapter.**" (Emphasis added)

4. N.C. Gen. Stat. § 135-1 defines pertinent terms as follows:

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings: . . .

(20) 'Retirement' means the termination of employment and the complete separation from active service with no intent or agreement, express or implied, to return to service. A retirement allowance under the provisions of this Chapter may only be granted upon retirement of a member. In order for a member's retirement to become effective in any month, ***the member must render no service***, including part-time, temporary, substitute, or contractor service, at any time during the six months immediately following the effective date of retirement. For purposes of this subdivision, service as a member of a school board or as an unpaid bona fide volunteer in a local school administrative unit shall not be considered service.

(Emphasis added)

5. N.C. Gen. Stat. § 135-1(23) defines the term "service:"

Service as a teacher or State employee as described in subdivision (10) or (25) of this section.

6. N.C. Gen. Stat. § 135-1(10) provides:

(10) 'Employee' shall mean all full-time employees, agents or officers of the State of North Carolina or any of its departments, bureaus and institutions **other than educational**, whether such employees are elected, appointed or employed: Provided that the **term 'employee' shall not include any person. . . or any part-time or temporary employee.**

(Emphasis added)

7. N.C. Gen. Stat. § 135-1(25) defines that:

'Teacher' shall mean any teacher, helping teacher, teacher in a job-sharing position under G.S. 115C-326.5 except for a beneficiary in that position, librarian, principal, supervisor, superintendent of public schools or any full-time employee, city or county, superintendent of public instruction, or any full-time employee of Department of Public Instruction, president, dean or teacher, or any full-time employee in any educational institution supported by and under the control of the State: **Provided, that the term "teacher" shall not include any part-time, temporary, or substitute teacher.**

(Emphasis added)

8. Respondent first argued that Petitioner violated N.C. Gen. Stat. § 135-1(20) because she worked for a covered employer during the six month waiting period following her initial retirement.

9. Since 1915, our appellate courts have ruled that:

When construing a statute[,], the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense.

Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915) When the language of a statute is unclear and ambiguous, a court may interpret the language of the statute in accordance with what the court presumed the legislature intended. *Carolina Truck & Body Co. v. GMC*, 102 N.C. App. 262, 402 S.E.2d 135, cert. denied. 329 N.C. 266, 407 S.E.2d 831 (1991)

10. The preponderance of the evidence established that Petitioner taught language arts, social studies, science, and math to students two nights a week, to help students prepare to go to LCC to take their original GED. Throughout her employment at LCC, Petitioner was only employed on a contract basis, and LCC only paid Petitioner for the hours she worked. Petitioner worked up to six hours a week, and was paid an hourly wage of \$15.00 to \$16.00.

11. The General Assembly defined how the terms “teacher” and “employee” are to be used in N.C. Gen. Stat. § 135-1. Applying those definitions to Petitioner in this case, N.C. Gen. Stat. § 135-1(10) explicitly excludes educational employees from that definition. By virtue of her teaching part-time at Lenoir Community College, Petitioner is not an “employee” under N.C. Gen. Stat. § 135-1(10). Neither is Petitioner a “teacher” as defined in N.C. Gen. Stat. § 135-1(25) as N.C. Gen. Stat. § 135-1(25) excludes part-time teachers from that definition.

12. Since Petitioner is neither a “teacher” nor an “employee,” she could not have, and therefore, did not provide “service” within the meaning of N.C. Gen. Stat. § 135-1(20), when she taught students at LCC on a part-time, contractual basis after her October 1, 2009 retirement from DHHS.

13. Respondent also argued that Petitioner violated N.C. Gen. Stat. § 135-1(20) because she had an agreement with a covered employer, before her retirement, to return to work for the covered employer following her retirement.

14. A preponderance of the evidence established that Petitioner met the requirements of N.C. Gen. Stat. § 135-1(20). Petitioner had a complete separation from active service with DHHS. Petitioner did agree with LCC, before her retirement from DHHS, that she would be available to work for LCC, after her retirement from DHHS. LCC was a “participating” employer with Respondent, although not the same employer from which Petitioner had retired with 31 plus years of service. Nevertheless, since Petitioner’s contract employment with LCC does not constitute “service” under N.C. Gen. Stat. § 135-1(23), Petitioner could not have had an “intent or agreement to return to service” under N.C. Gen. Stat. § 135-1(20).

15. Reading N.C. Stat. § 135-1(20) in the context of Chapter 135 clearly shows that the legislature anticipated the possibility that recipients under the Retirement System might return to active employment on behalf of the State of North Carolina. Thus, the prohibitions against receiving retirement benefits after returning to work or “service” in N.C. Gen. Stat. § 135-1(20), and the suspension of retirement benefits if a “teacher” or State “employee” returns to “service” as a “teacher” or “employee” in N.C. Gen. Stat. § 135-3(8). To use the vernacular, the legislature does not want retirees to “double dip” by receiving retirement benefits, yet still contributing to the Retirement System.

16. Here, Petitioner was not “double dipping” as she was working on a contract basis with LCC, did not contribute to the Retirement System, and did not accumulate any leave.

17. Notably, the legislature has enacted N.C. Gen. Stat. § 135-3(8)(c), to be effective June 30, 2013. In that section, the retirement allowance of a retired teacher or employee “shall be suspended” when that teacher or employee is reemployed by, “or otherwise engaged to perform services,” for an employer participating in the Retirement System “on a part-time, . . . or on a fee for service basis, whether contractual or otherwise, **and**” if that teacher or employee earns more the reported compensation amount during the 12 months immediately after the effective date of retirement. While obviously, this new section has no effect on Petitioner’s case, it is instructive as to the legislature’s intent in limiting a retired teacher or employee’s ability to “double dip” after retirement from service as a teacher or State employee.

18. For the foregoing reasons, Respondent deprived Petitioner of property, otherwise substantially prejudiced Petitioner’s rights, exceeded its authority or jurisdiction, acted erroneously, and failed to act as required by law or rule when it determined that Petitioner’s October 1, 2009 retirement was null and void from October 1, 2009 until January 31, 2011, and began recouping \$46,865.44 in retirement monies already paid to Petitioner, by deducting \$450.00 from Petitioner’s monthly TSERS service retirement benefits.

19. Petitioner is entitled to a refund of all funds which Respondent has deducted from Petitioner’s monthly TSERS service retirement benefits on account of the alleged overpayment of benefits, which supposedly occurred between October 1, 2009 through January 31, 2011. Petitioner is entitled to 4% interest on the amount of the contributions being refunded to her, in accordance with N.C. Gen. Stat. § 135-5(f).

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent’s decision that Petitioner’s October 1, 2009 retirement was null and void, and thus, Petitioner owed Respondent \$45,865.44 in overpayments, should be **REVERSED**. Respondent is to cease recovering any overpayment funds from Petitioner’s retirement benefits, and shall restore to Petitioner all funds which it has previously so recovered, together with the employee contributions which were made on her behalf from October 1, 2009

through January 31, 2011, with interest on the contributions as provided in N.C. Gen. Stat. § 135-5(f).

NOTICE AND ORDER

The Board of Trustees of the Teachers' and State Employees' Retirement System will make the Final Decision in this case. That Agency is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The Board is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties, furnish a copy to the parties' attorneys of record, and furnish a copy to the Office of Administrative Hearings.

This the 12th day of July, 2012.

Melissa Owens Lassiter
Administrative Law Judge